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No. (1)

Supreme Court, U.S.
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In The

# Supreme Court of the United States

WILLIAM A. MANCI,

*Petitioner,*

v.

BALL, KOONS & WATSON, A PARTNERSHIP, E.E. BALL – PARTNER, HAROLD A. KOONS, III – PARTNER, AND RUSSELL J. WATSON – PARTNER,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Did the Alabama Supreme Court deliberately or recklessly ignore or disregard the true facts contained in the record and find the existence of facts not included in the record upon which state law was correctly applied that resulted in the affirmance of the judgment from which Manci appealed?

## LIST OF PARTIES

The parties in this case are:

1. Ball, Koons & Watson, a partnership
2. E.E. Ball – partner
3. Harold A. Koons, III – partner
4. Russell J. Watson – partner
5. William A. Manci

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The Court should grant the writ because all parties in a state court proceeding are guaranteed by the due process clause of the Fourteenth Amendment of the United States Constitution that no State shall deprive any person of property without due process of law, and that every litigant in a state court has a constitutional right to a fair trial and a fair review of the record by an appellate court. Fundamental fairness is required

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## OPINION BELOW

This action was filed in the circuit court of Baldwin County, Alabama on May 14, 2004. The plaintiffs Ball, Koons & Watson, a Baldwin County partnership engaged in the practice of law in Alabama. The defendant William A. Manci (Manci) is a Baldwin County resident who engaged BK&W to represent him in the matter of a land dispute with his sisters co-executrixes of the Estate of Arthur Manci, the deceased father of all of them. Manci filed a counterclaim against BK&W and the three partners.

A long-running discovery dispute resulted in the trial court imposing discovery sanctions against Manci of default and dismissal of his counterclaim. The trial judge conducted a hearing on the issue of damages. On March 22, 2007 he entered judgment against Manci in the sum of $1,212,045.78.

Manci appealed. The Alabama Supreme Court affirmed.

Manci is now filing this petition for writ of certiorari to the Supreme Court of Alabama.

## BASIS OF JURISDICTION IN THIS COURT

The Opinion released on May 23, 2008 is final. The jurisdiction of this Court is based on 28 U.S.C. 1257. Manci presented his claim to the Supreme Court of Alabama promptly after the Opinion was released.

This petition was filed within the time prescribed in 28 U.S.C. 2101 and Rule 13 of this Court.

The Alabama Supreme Court denied Manci's motion for the Court to accept Manci's Application For Rehearing and Brief two weekend days out-of-time. Rule 26 of the Alabama Rules of Appellate Procedure gives the Alabama Supreme Court discretion to accept or refuse to accept late filing of any paper.

The refusal to accept Manci's two-day late filing for the reasons he set out with particularity in his motion for the Court to accept the filing is not an adequate state ground for refusing to accept and rule on the federal question presented in the Application For Rehearing, and it does not preclude the Court from reviewing the federal question presented.

## CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment of the United States Constitution.

## STATEMENT OF THE CASE

**1.** This civil action was commenced in the circuit court of Baldwin County, Alabama on May 18, 2004, by the plaintiff and counterclaim defendant Ball, Koons & Watson, a partnership, (hereinafter BK&W) filing a complaint against the defendant and

counterclaim plaintiff William A. Manci (hereinafter Manci) and other named defendants and described fictitious defendants.[1] Manci was a former client of BK&W and all of BK&W's claims for relief that are made against him in the complaint are predicated on that attorney-client relationship and on Manci's alleged breach of a contingent fee agreement signed on November 10, 1998 (hereinafter the Contingent Fee Contract). (App.EE, App.122).[2]

**2.** On July 14, 2005, Manci filed his answer to BK&W's complaint and a counterclaim. Manci's averments in the counterclaim are made in 56 separately numbered paragraphs and separate subparagraphs in many of the numbered paragraphs. (C.34-63).

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[1] In an Order entered in the clerk's record on March 7, 2005, all of the defendants except Manci were dismissed with prejudice (App.AA, App.90); therefore, no reference is made in this Petition to any of the filings of those defendants prior to entry of the Order of Dismissal.

[2] Counsel for Manci is aware that Rule 14.1(g) of this Honorable Court provides that the petition shall contain a concise statement of the case setting out the facts material to consideration of the questions presented. The facts stated in this statement of the case are material to the issue of whether the Alabama Supreme Court, under the facts before the Court in the record, did deliberately disregard the true facts in the record and make findings of facts to which it applied correct principles of Alabama law knowing that the found facts had no support in the record and were in conflict with and contrary to the true facts in the record which would require application of other correct principles of Alabama law and mandate a legal conclusion that the appealed judgement could not be affirmed.

**3.** In his counterclaim Manci added as additional counterclaim defendants all of the attorney partners in the BK&W partnership, namely: E.E. Ball (E.Ball), Harold A. Koons, III (H.Koons) and Russell J. Watson (R.Watson) (C.38); and they were each served with the summons and counterclaim on July 21, 2004. (C.86-89).

**4.** On July 20, 2004, BK&W filed the following reply to Manci's counterclaim:[3] (App.DD, App.119).

> 1. Comes now the Plaintiff and for answer to the Counterclaim would show unto your Honor that the Plaintiff admits that an attorney-client relationship existed against it and William A. Manci at all times material to this complaint and that the Plaintiff is a legal service provider as defined in section 6-5-573, Code of Alabama (1975).
>
> 2. Each and every other material allegation of the Counterclaim is denied and strict proof thereon is demanded.

**5.** On October 12, 2004, the Chief Justice of the Alabama Supreme Court assigned retired circuit judge Honorable N. Pride Tompkins to preside over all matters in this case (the trial judge). (App.CC, App.117).

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[3] The Alabama Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure and the construction placed on a Federal Rule of Civil Procedure are authorities for construction of the Alabama Rule.

**6.** On February 16, 2005, BK&W filed a motion to propound more than 40 interrogatories. (the Motion). BK&W attached as an Exhibit to the Motion BK&W's proposed Rules 33, 34 and 36 A.R.Civ.P. consolidated discovery requests (hereinafter the Consolidated Discovery Requests). The Motion has a certificate of service date of February 14, 2005. The Consolidated Discovery Requests attached as an Exhibit to the Motion also has a certificate of service date of February 14, 2005.[4] (App.BB, App.92).

**7.** On April 19, 2005, Manci filed an Offer of Judgment in the sum of $50,000 plus accrued costs. (App.Z, App.88).

**8.** On April 26, 2005, Manci filed a motion to compel BK&W to file an amended reply to his counterclaim in compliance with the pleading requirements plainly set forth in Rule 8(b) A.R.Civ.P. (App.Y, App.82).

**9.** On May 23, 2005, the counterclaim defendants E.Ball, H.Koons and R.Watson filed the following joint reply to Manci's counterclaim that was served on each of them on July 21, 2004: (App.X, App.79).

---

[4] The Motion request leave of court to propound more than 40 interrogatories to Manci, but the Consolidated Discovery Requests attached as an Exhibit facially includes Rule 33 interrogatories, Rule 34 requests for production, and Rule 36 requests for admissions.

> Comes now E.E. Ball, individually, Harold A. Koons, III, individually and Russell J. Watson, individually, said persons being all of the attorney partners of Ball, Koons & Watson and would make their answer to the complaint (sic) as follows:
>
> Each said individual counterclaim defendant would incorporate the answer of Ball, Koons & Watson, a partnership and would show unto this Honorable Court as follows:
>
> 1. Each said individual admits that an attorney-client relationship existed between each said individual and William A. Manci, at all times material to the Complaint.
>
> 2. Each said individual admits that he is a legal service provider as defined in Section 6-5-573 of the Code of Alabama (1975).
>
> 3. Each and every other material allegation of the counterclaim is denied as to each individual attorney and strict proof thereof is demanded.

**10.** An Order of the trial judge granting BK&W's Motion was filed in the clerk's record on June 13, 2005. (App.W, App.77).

**11.** On June 17, 2005 BK&W filed the following motion to compel Manci to answer BK&W's interrogatories: (App.V, App.72).

> 1. The Plaintiff propounded Interrogatories on February 14, 2005.

2. The Court has heretofore granted a Motion to Propound more than 40 Interrogatories.[5]

3. On May 24, 2005, the undersigned attorney wrote the Defendant's attorney requesting an answer within ten days to avoid a Motion to Compel. A copy of this letter is attached as Exhibit A and incorporated by reference.

4. As of the date of the filing of this motion, the Interrogatories have not yet been answered.

WHEREFORE, Plaintiff prays that Your Honor will enter an Order compelling the Defendant to answer the Plaintiff's Interrogatories heretofore propounded and will grant such other, further and different relief to which the Plaintiff may be entitled, the premises considered.

**12.** On July 20, 2005, Manci filed a motion for summary judgment (App.T, App.66). The affidavit of

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[5] The June 13, 2005 Order granting BK&W's Motion was the leave of court required by the prohibition stated in the second paragraph of Rule 33(a) A.R.Civ.P. that "[a] party shall not propound more than (40) forty interrogatories to any other party without leave of court," and the procedure for a party to propound interrogatories to another party is stated in the first paragraph of Rule 33(a) which states in relevant part that "[a]ny party may serve upon any other party written interrogatories. . . . to be answered by the party served." BK&W did not serve interrogatories upon Manci before or after the June 13, 2005 Order granting the Motion.

Manci with the identified Exhibits attached thereto was filed in support of the summary judgment motion. (C.199-216). Manci also incorporated in the summary judgment motion by reference a brief filed in conjunction with the motion which set forth a narrative statement of the relevant pleadings, motions, orders, judgments and other documents included in the clerk's record in the Baldwin County circuit court case of "In Re: The Estate of Arthur Manci, Deceased," Case Number(s) CV-94-786 – 94-786.01. (C.217-28 )).

**13.** On July 20, 2005, Manci filed a motion to stay discovery pending a ruling on his motion for summary judgment. (App.U, App.69).

**14.** After a March 16, 2006 hearing before the trial judge on all pending motions he signed the following Order on March 28, 2006: (App.S, App.64).

> 1. The Defendant William A. Manci's Motion for Summary Judgment is DENIED.
>
> 2. That all discovery be completed within 30 days of the date of this order.

The trial judge made no ruling on BK&W's pending motion to compel Manci to answer BK&W's interrogatories.

**15.** On April 4, 2006, counsel for BK&W wrote a letter to the trial judge requesting that he clarify his March 28, 2006 Order that "all discovery be completed within 30 days of the date of this order." (App.R, App.62).

**16.** On April 10, 2006, the trial judge wrote a letter to counsel for BK&W in which he clarified his March 28, 2006 Order: "I meant in the order the discovery that was outstanding contained within the court's file." (App.Q, App.61).

**17.** On April 11, 2006, counsel for BK&W filed a Notice of Deposition to depose Manci on May 24, 2006. (App.P, App.58).

**18.** On April 13, 2006, Manci filed an amended answer to BK&W's complaint and an amended counterclaim for a declaratory judgment and damages with Exhibits A through K attached thereto so as to cause his answer and counterclaim to read in its entirety as amended therein. (C.463-513). Manci's averments in the amended counterclaim are made in 55 separately numbered paragraphs and separate subparagraphs in many of the numbered paragraphs. (C.468-495).

**19.** On April 21, 2006, Manci served and timely filed his response to each discovery request in BK&W's Consolidated Discovery Requests in compliance with the trial judge's March 28, 2006 discovery Order. (C.514-590). In his discovery responses Manci restated each Rule 33 A.R.Civ.P. interrogatory in its entirety and thereunder answered each interrogatory separately and fully in writing except the interrogatories to which counsel for Manci objected and stated each reason for each objection in lieu of an answer to the interrogatory. The responses and objections were

in strict compliance with the requirements set forth in Rule 33(a) A.R.Civ.P.

Manci's responses to each Rule 34 A.R.Civ.P. request for production of documents was in compliance with the requirements of Rule 34.

There were no Rule 36 A.R.Civ.P. requests for admissions included in the Consolidated Discovery Requests.

**20.** On May 18, 2006, BK&W filed a Second Notice of Deposition to depose Manci on June 28, 2006. (App.O, App.55).

**21.** On July 14, 2006 BK&W filed the following motion to show cause: (App.N, App.50).

> 1. The Plaintiff heretofore propounded discovery in this matter, on or about February 14, 2005.
>
> 2. The Court heretofore granted a Motion to propound more than forty interrogatories.
>
> 3. On May 24, 2005, the undersigned attorney wrote the Defendant's attorney requesting an answer within ten days to avoid a Motion to Compel. A copy of that letter is attached as Exhibit 'A' and incorporated by reference.
>
> 4. The responses received in answer to Plaintiff's interrogatories are non-responsive

> and designed to obfuscate the discovery process.

**22.** On September 7, 2006, counsel for BK&W wrote the trial judge a letter and requested that the order be enclosed for his convenience which granted his motion. (App.M, App.47).

**23.** On September 16, 2006, counsel for Manci wrote the trial judge a letter telling the judge he was provided with a copy of Mr. Brackin's September 7, 2006 letter and copy of the proposed order and respectfully suggested that he was entitled to a hearing on the motion. (App.K, App.42).

**24.** On October 9, 2006 counsel for Manci learned for the first time that the trial judge signed the proposed Order granting the motion to show cause, which Order was entered in the clerk's record on September 15, 2006. The Order was:

> The Motion to Show Cause having come before the Court and found to be well taken, it is hereby GRANTED and Defendant is hereby ORDERED to fully and completely answer the interrogatories as propounded on or before October 16, 2006, or it is hereby ORDERED that the Defendant appear before this Court on October 16, 2006 at the Foley Courthouse at 10:00 a.m. to show cause as to why he should not be placed in the Baldwin County Jail for failure to comply with the

previous discovery Orders of this Court.[6] (App.L, App.44).

**24.** On October 11, 2006, which was five days before the discovery deadline for Manci "to fully and completely answer the interrogatories as propounded on or before October 16, 2006," Manci filed a motion for the trial judge to reconsider and vacate his September 15, 2006 ex parte discovery order granting BK&W's motion to show cause, and Manci included therein and a motion for a protective order. (C.618-627).

**25.** The trial judge did not have a hearing on BK&W's motion to show cause and Manci's motion for him to vacate his order granting the motion to show cause until January 2, 2007.

**26.** The January 2, 2007 hearing on all pending motions was reported. (Vol. 6 of record on appeal – R-1 – R-47). On line 18 of page 4 counsel for BK&W told the trial judge that "we filed our Motion to Show Cause because these were not complete responses." At the conclusion of his argument, commencing on line 1 of page 11 the trial judge asked: "Anything else." Counsel for BK&W responded:

---

[6] The only previous discovery Order made by the trial judge was his March 28, 2006 Order that "all discovery be completed within 30 days of the date of this order"; and Manci timely complied with that discovery Order.

MR. BRACKIN: Yes .....

I would also say that we've scheduled Mr. Manci's deposition twice and he's refused to show both times. . . . (R.11).

**27.** Counsel for Manci commenced his argument on line 12 of page 12 of the transcript in opposition to BK&W's motion to show cause and in support of Manci's motion for the court to reconsider and vacate his September 15, 2006 order granting the motion to show cause. Commencing on line 5 of page 17 counsel for Manci argued that Rule 33(a) and Rule 37(a) set forth the procedure that must be followed before a trial court will have authority to impose discovery sanctions under Rule 37(b).

**28.** Commencing on line 1 of page 18 counsel for Manci specifically cited and argued the case of *Ex parte Terminix International Company L.P.* which case was also cited and argued to the Alabama Supreme Court on page 45 of Manci's appellant brief. In *Ex parte Terminix International Company L.P.*, 897 So. 2d 280 (Ala. 2004) the Supreme Court first cited Rule 37(a)(2) which provides that if a person from whom discovery is sought objects to or fails to comply in whole or in part with a discovery request the discovering party *may* move for an order compelling an answer. In *Terminix* at page 283 the Supreme Court then elaborated and explained:

> While Rule 37(a)(2), Ala. R. Civ. P., refers to the discovering party's motion to compel in permissive terms 'the discovering party may

> move for an order compelling an answer'), the discretion thus conferred relates only to the decision that a discovering party must make as to whether to pursue further discovery by motion after the objection has been interposed. See C. Lyons, Jr., Alabama Rules of Civil Procedure Annotated § 34.3 (3d ed. 1996) (discussing the analogous Rule 34, Ala. R. Civ. P.):
>
> As is true with objections to interrogatories and objections to requests for admissions, the discovery procedure stops upon the interposition of the objection unless a motion under Rule 37 is filed by the party seeking discovery. Absent such a motion, the objection is not brought to the attention of the court for a ruling.
>
> Only in the event that the party seeking discovery elects to move to compel production over the objection of the party from whom discovery is sought does the issue of the sufficiency of an objection come before the trial court.

**29.** After reading pertinent parts of the Terminix case to the trial judge during his oral argument, commencing on line 15 of page 24 counsel for Manci argued in substance that when Manci interposed objections to discovery requests made in BK&W's Consolidated Discovery Requests, if BK&W wanted to obtain an order compelling Manci to answer any or all of the interrogatories to which Manci objected, the burden was on BK&W at that point of the discovery

process to file a motion to compel in accordance with the procedural requirements set forth in Rule 33(a) and Rule 37(a), and since BK&W did not do that, the issue of the sufficiency of Manci's objections to the requested discovery was not before the trial judge and BK&W's discovery was stopped at that point.

**30.** Commencing on line 21 of page 25 counsel for Manci stated to the trial judge:

> There's something before I forget about it, Your Honor. He stood here and represented to Your Honor that Mr. Manci's deposition has been scheduled two times and he didn't show up either time. He scheduled the deposition of Mr. Manci without ever contacting me and I tried to rearrange my schedule to see if I could go ahead and be present on the date that he had scheduled the deposition, which I could not. And I contacted his office and I wrote a letter and his secretary notified me that she had tried to communicate with me about that and that she was unable to get a response. Well, she's a nice lady and I don't dispute that she tried to do it, but I don't know why she couldn't communicate with me and leave a message if I wasn't there on my voice mail. But that is the reason Manci didn't show up for the first deposition that was scheduled, because the date it was scheduled I already had a previous commitment that I couldn't get out of. So he re-noticed the deposition a second time. Two or three days before the deposition was scheduled his office called to confirm that we

> intended to be present at the second deposition and I informed his secretary that we would be present and on time to submit to the second noticed deposition. The day before the deposition was scheduled to be held I received a notice from Mr. Brackin's office that he had something come up and he needed – he couldn't take the deposition as scheduled. Now, if you take what he said at face value, that he scheduled the deposition of Mr. Manci two times and he didn't show up, then I would be lucky to walk out of here either with a dismissal of my case maybe or sanctions imposed on me, but that simply is not the facts. The facts are exactly what I told Your Honor as to how those two depositions were not taken. (R.25-27).

**31.** Commencing on line 8 of page 29 to line 13 of page 31 of the reporter's transcript the following statements, representation and request was made to the trial judge by counsel for Manci:

> Now, I had previously filed a motion for Your Honor to compel them to file a proper answer to the counterclaim as required by Rule 8. Now when we came . . . before the Court, Mr. Brackin said that he wanted to wait until he took discovery to file answers to the complaint, but then he said I'll clean it up, Judge. Well, Your Honor never ruled on it; he never cleaned it up. . . . Judge, I asked (sic) Your Honor to order him to file an answer to my First Amended Counterclaim that was filed on April 13th. And the purpose of that, Your Honor, of course, is to carry out the

> intent of the rules, to be an expeditious and inexpensive preparation and disposition of the case in the language that it is stated then in Rule 2 or Rule 3 of the Rules of Civil Procedure, and if he admits anything then that eliminates any discovery, the necessity of any discovery on that issue. As it is right now there is no answer.

**32.** Commencing on line 14 of page 33 counsel for BK&W then stated to the trial judge:

> Now, Mr. Boswell is hard to reach. He doesn't have an office, he doesn't have a secretary,[7] and we try to reach him to set these depositions and we can't get him. And so when I can't get him all I can do is set it and then if he calls and says I can't do it on that day we'll work around and get another date. And I'm willing to do that. I'm willing to continue to do that, . . . (R.33)

**33.** Counsel for BK&W was present and heard the statements to the trial judge by counsel for Manci about how it came to be that neither of the two notices of Manci's deposition had resulted in Manci being deposed and he did not deny or try to qualify anything counsel for Manci stated to the trial judge.

---

[7] Since Hurricane Katrina destroyed Boswell's office in downtown Mobile he has had and continues to have an office in his home and he does not have a full time secretary. He receives voice mail telephone messages at his listed office telephone number 24 hours a day 7 days a week which remains the same as it was prior to Hurricane Katrina.

**34.** The trial judge signed an Order that was filed in the clerk's record on January 10, 2007, wherein he ordered Manci to provide full and complete answers to BK&W's discovery on or before the 19th day of January, 2007 or " . . . be found in contempt for his failure to do so." (App.J, App.39).

**35.** On January 19, 2007, counsel for Manci filed in the circuit clerk's office a "motion to stay proceedings pending disposition by the Alabama Supreme Court of petition for writ of mandamus and motion to stay." (App.I, App.35).

**36.** On January 25, 2007, Manci filed a petition for writ of mandamus in the Supreme Court of Alabama, Supreme Court Number 1060633, wherein he asked the Supreme Court to find that the trial judge exceeded his authority in ordering Manci to provide full and complete answers to BK&W's interrogatories as propounded on or before January 19, 2007.

**37.** On January 31, 2007, BK&W filed a "motion for sanctions for failure to comply with discovery orders." (App.I, App.35).

**38.** On January 31, 2007, the trial judge signed a "COURT ORDER" that was filed in the clerk's record on February 2, 2007 granting BK&W's Motion for sanctions. The COURT ORDER concluded with the imposition of sanctions:

> It is therefore ORDERED, ADJUDGED, and DECREED that a default judgment is entered on behalf of the Plaintiffs (sic) and

> against the Defendant herein. A hearing on damages is to be set by a separate order.
>
> It is further ORDERED, ADJUDGED, and DECREED that the Defendant's Counterclaim is due to be, and hereby is DISMISSED WITH PREJUDICE. (App.H, App.30).

**39.** The Alabama Supreme Court denied Manci's petition for writ of mandamus in Supreme Court Number 1060633 on February 27, 2007.

**40.** On March 6, 2007, the trial judge signed an Order setting a hearing before him on March 16, 2007, for the purpose of assessing damages against Manci. (App.F, App.26).

**41.** On March 16, 2006, Manci filed in open court a written motion to continue the hearing on that date. That motion is not included in the clerk's record. However, at the commencement of the hearing on that date, commencing on line 7 of page 4 through line 14 of page 7 of the reporter's transcript the following argument was made to the trial judge in support of Manci's motion to continue:

> THE COURT: Anything you'd like to present on your motion to continue?
>
> MR. BOSWELL: Yes. Your Honor, I would. For the record, Your Honor, I received a fax transmission, I'm not sure whose office it was from, but I received it, I think, on March 6th, on the date that it was signed, notifying me that this hearing was set today. March

> 16th, which was ten days after that, which was eight calendar days between the date I received a notice and the date of the hearing, and there were two weekend days, which I had six working days from the date that I received the notice. And I was given, Your Honor, inadequate time to prepare and have subpoenas issued for persons and for subpoena duces tecum for persons to present records that I believe that my client needs to defend against the damage claim that is being made against him in this case. And I submit to the Court that I was also entitled to sufficient advance notice of the hearing to give me an opportunity to depose the defendant (sic) in the case for the purpose of getting the evidence to offer in opposition to their damage claim.
>
> So I submit to Your Honor that we were given inadequate notice, which constitutes a denial of my client's due process right to a notice of a hearing and an opportunity to have a meaningful hearing, and that this short notice deprives him of his due process right under the 14th Amendment of the Constitution and under the Alabama Constitution. Thank you.

At line 13 page 7, the trial judge denied Manci's motion to continue the damages hearing.

**42.** On March 19, 2007, the trial judge signed a Final Decree that was entered in the State Judicial Information System on March 22, 2007 awarding

BK&W a money judgment against Manci in the sum of $1,212,045.78 (App.E, App.24):

FINAL DECREE

> THIS MATTER coming before the Court for a hearing to establish damages to which Plaintiff Ball, Koons & Watson, a Partnership, is entitled in the above styled cause of action, and with the parties being present with their respective attorneys, and with testimony and evidence being taken on the 16TH day March, 2007 and the Court considering the same it is hereby ORDERED, ADJUDGED, and DECREED that a judgment is hereby entered in favor of the Plaintiff, Ball, Koons, & Watson, a Partnership and against the Defendant, William A. Manci, in the sum of One Million Two Hundred Twelve Thousand Forty Five Dollars and Seventy Eight Cents ($1,212,045.78).
>
> It is further ORDERED, ADJUDGED, AND DECREED that the Clerk of the Circuit Court of Baldwin County, Alabama shall disburse to the Law Firm of Brackin, McGriff, and Johnson, P.C. as attorneys for the Plaintiff all sums held by the clerk in this action as heretofore ordered by the Hon. James H. Reid on December 20, 2006, in that case styled as In Re: The Estate of Arthur Manci, Deceased, CV-1994-786.

**43.** Manci filed a timely notice of appeal.

**44.** Counsel for BK&W filed Appellee's brief. Extracted relevant pages are identified as Appendix

GG, App.148. The pages contain statements to which counsel for Manci filed a reply brief.

**45.** Counsel for Manci filed a reply brief that included the following (App.FF, App.133).

> In the appellee brief of BK&W the following statement is made in the STATEMENT OF CASE:
>
> On April 11, 2006, BK&W noticed the deposition of Manci. (CR 456&462). Manci failed to respond or appear for any deposition . . . (brf.3)
>
> Rule 37(d) A.R.Civ.P. provides in relevant part:
>
> If a party . . . fails . . . to appear before the officer who is to take the deposition, after being served with a proper notice, . . . without having made an objection thereto, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule . . .
>
> On motion made by a discovering party a trial judge has authority under Rule 37(d) A.R.Civ.P. to impose the ultimate discovery sanction of dismissal or default without the necessity of the discovering party having first filed a motion to compel and without the necessity of an order compelling discovery if a party fails to appear for a deposition after

being served with a proper notice without having made an objection thereto. Moore's Federal Practice, Vol. 7, § 37.91; Blair v. Cooper, 437 So. 2d 1249 (Ala. 1983); Iverson v. Xpert Tune, Inc., 553 So. 2d 82 (Ala. 1989); Cincinnati Ins. Co. v. Synergy Gas, Inc., 585 So. 2d 822 (Ala. 1991).

**46.** Counsel for Manci then reproduced the exchange between the lawyers concerning Mr. Brackin's representation that Manci was served with two separate notices of deposition and failed to show for either.

**47.** The Supreme Court released its Opinion in this case on May 23, 2008. (App.A) Manci's Application For Rehearing and Brief were due on Friday June 6, 2008, but they were not filed on that date.

**48.** On Monday June 9, 2008, Manci filed his Application For Rehearing (App.HH, App.156) and his Brief (App.II, App.174) in the Supreme Court by depositing it in the U.S. Certified Mail under the "deemed filed" Rule 25, A.R.App.P.

**49.** Manci also filed with the Application for Rehearing and Brief a combined Rule 27 A.R.App.P. motion for the Supreme Court to accept the late filing. (App.JJ, App.193).

**50.** In the motion to accept the late filing, counsel for Manci stated with particularity the reasons he was unable to file on time.

**51.** Appendix KK, App.206, is a copy of the certified mail receipt showing the mailing on June 9,

2008 and the return receipt showing receipt by the Supreme Court on June 12, 2008.

**52.** Counsel for Manci was surprised by the finding of fact made by the Court in the opinion that Manci argued that BK&W had admitted the averments of the first amended counterclaim by filing no reply, but the Court found that the reply to the original counterclaim was adequate enough to make it unnecessary to file a reply to the amended counterclaim. BK&W had never made that contention or argument. If the Court had applied the controlling law on the legal effect of the failure to file a reply, it would have been obligated to find that all of the sanctions imposed were without legal effect because all of the counterclaim defendants had admitted all of the averments in the original and amended counterclaim.

**53.** Manci was surprised that the Court found as a fact that Manci failed to appear for a properly noticed deposition because if that had been true to the that fact alone would have, on motion of BK&W, been sufficient reason to impose discovery sanctions including the possibility of default or dismissal, without the necessity of an order compelling attendance under Rule 8d A.R.Civ.P. There is no evidence in the record that Manci failed or refused to appear at a noticed deposition.

**54.** The Supreme Court issued an Order dated June 13, 2008 denying Manci's Motion for the Court to accept the late filing. (App.B, App.19).

**55.** The Supreme Court issued the Certificate of Judgment on June 10, 2008. (App.C, App.20).

**56.** All of the above is in the record. The Alabama Supreme Court released the opinion in this case on May 23, 2008.

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## ARGUMENT

Rule 8 A.R.Civ.P. provides in relevant parts:

(b) Defenses; form of denials.

A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state, and this has the effect of a denial. . . . Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, the pleader may do so by general

> denial subject to the obligations set forth in Rule 11.
>
> (d) Effect of failure to deny.
>
> Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading . . .

It is stated in *Moore's Federal Practice-Civil*, Volume 2: Analysis: Rules 7-12, Chapter 8, General Rules of Pleading – § 8.08, in relevant part as follows:

> § 8.08 Failure to Deny Averments in Pleadings.
>
> [1] Averments to Which Responsive Pleading Required Deemed Admitted if Not Denied.
>
> Failure to deny an averment in a pleading to which a responsive pleading is required, other than those as to the amount of damages, is deemed an admission. [F.R.Civ.P.8(d)] Responsive pleadings are required to the complaint [and] a counterclaim denominated as such, . . . .

"The theory of Rule 8 [F.R.Civ.P.] is that a [party's] pleading should apprise the [adverse party] of the allegations in the complaint that stand admitted and will not be an issue at trial and those that are contested and will requ re proof to be established to enable the [pleading party] to prevail." *Yarnell v. Brooke Roberts, M.D.*, 66 F.R.D. 417, 423 (E.D. Pa.

1975) (citing 5 Wright and Miller, Federal Practice and Procedure § 1261 (1969)). "[I]t is fundamental that judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them. A fact admitted by an answer [or reply] is no longer a fact in issue." *Hill v. Federal Trade Commission*, 124 F.2d 104, 106 (5th Cir. 1941). "A judicial admission is binding on the party making it and a judicial admission may not be explained or controverted." *Martinez v. Bally's La., Inc.*, 244 F.3d 474, 476-477 (5th Cir. 2001).

In *George D. Howard, Sr. v. Charles D. Jordan*, 390 So. 2d 1053 at 1054 (Ala. 1980), the Alabama Supreme Court stated:

> A basic axiom in cases involving motions for summary judgment is that when such a motion is made, as provided by ARCP 56, the adverse party may not rest upon mere allegations or denials in his original pleadings, but must set forth by affidavit, *or otherwise*, sufficient facts showing a genuine issue for trial. ARCP 56(e). We note in this case Appellant's failure to follow this *procedural mandate*. Significantly, Appellant's answer to the complaint below controverted neither the allegations of the guarantor status of the Defendant nor those of the assignee status of the plaintiff. n1
>
> n1 We note, for *emphasis*, that Appellant's insistence that these issues of fact are

> presented (that is, whether Defendant below acquired the legal status of guarantor and whether Plaintiff below acquired the legal status of assignee) is misplaced, in that neither of these allegations of Plaintiff's complaint is controverted in Defendant's answer. Thus, as to these issues, Plaintiff bears no further burden as to their proof. Rule 8(d), ARCP.

In *Guilford v. Bell,* 637 So. 2d 1364 (Ala. Civ. App. 1994), the relevant facts were in substance as follows:

Guilford filed a complaint seeking a sale for division of jointly-owned real property. In the complaint, Guilford stated the identities of the interested parties and their degree of ownership in the real property. The joint owners filed an answer and an election to purchase Guilford's interest in the property. The price the joint owners were required to pay Guilford for his fractional interest was based upon the fractional ratio that his undivided interest in the property bears to the property as a whole, and Guilford alleged in this complaint that he owned an undivided 1/192nd interest in the property. After a series of motions and answers to motions, the trial court found that the joint owners had complied with all of the statutory procedural requirements to entitle them to purchase Guilford's interest in the property. Guilford appealed. On appeal, the joint owners contended that they had never agreed that Guilford in fact owned the fractional interest as he averred in his

complaint because their answer to that averment in Guilford's complaint neither admitted nor denied Guilford's averment of his fractional undivided ownership in the property. The Court of Civil Appeals stated the consequences of the joint owners "neither admit nor deny" answer to Guilford's averments in his complaint:

> On appeal, the joint owners contend that because their answer to the complaint neither admitted nor denied the percentages set out in paragraph four of the complaint, there was no agreement as to the fractional interest held by Guilford and that his reliance on Kittrell, 396 So. 2d 93, is misplaced.

However, Rule 8(d) A.R.Civ.P. provides in pertinent part:

> Effect of failure to deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.
>
> Additionally, we find the following statement in Champ Lyons, Jr., Alabama Practice: Rules of Civil Procedure Annotated 112 (1st ed. 1973):
>
> An answer . . . stating that [the averments] were "neither admitted nor denied, but proof thereof is demanded if material" was an insufficient denial to raise an issue and put the plaintiff to proof.

In Matthew Bender & Company, Inc., "Alabama Civil Procedure" Chapter 4, Pleadings and Pretrial Motions, Hearings and Proceedings, § 4.14, the editor cites the *Guilford* case and makes the following editorial comment of the holding in *Guilford*: "Gone are the days when defense counsel could beard a plaintiff by neither admitting nor denying his allegations, but demanding strict proof thereof."

To the same effect see: *Reeder v. Reagan*, 590 So. 2d 296 (Ala. Civ. App. 1991); *Fontes v. Porter*, 156 F.2d 956 (9th Cir. 1946); *Russell v. Dorfman*, 188 F.2d 711 (7th Cir. 1951); *Martinez v. Cornell*, 229 F.R.D. 236 (D. N.M. 2005); other federal and state court decisions from many States to the same effect are too numerous to cite herein.

Counsel for Manci tried on several occasions to have counsel for all of the Counterclaim Defendants file a proper reply to the original Counterclaim and a reply to the Amended Counterclaim and he refused to do so.

The purpose of Rule 37 A.R.Civ.P. is to authorize a trial court to compel the production of evidence. "The rule is designed to empower the court to compel production of evidence by the imposition of reasonable sanctions". *Weatherly v. Baptist Medical Center*, 392 So. 2d 832, 836 (Ala. 1981), quoting from *B.F. Goodrich Tire Co. v. Lyster*, 328 F.2d 411 (5th Cir. 1964).

If BK&W had been entitled to all of the requested discovery and if Manci had provided to BK&W all of

the discovery requested in BK&W's Consolidated Discovery Requests, BK&W would have been unable to use the obtained evidence to controvert or explain any of the binding and conclusive judicial admissions made as a result of BK&W failure to file a reply to Manci's Amended Counterclaim. Those judicial admissions are not only binding and conclusive on BK&W, they are binding and conclusive on the trial judge, and on any appellate court that may review the alleged discovery default issues. BK&W's failure to obtain all of its requested discovery from Manci was harmless.

Due to BK&W's failure to file a proper reply to Manci's original counterclaim and BK&W's failure to file a reply to Manci's amended counterclaim, BK&W admitted all of the averments in Manci's original counterclaim and all of the averments in Manci's amended counterclaim: (1) Manci is entitled to have the default judgment in favor of BK&W and against him set aside; and (2) he is entitled to have the dismissal of his amended counterclaim against BK&W set aside.

## ARGUMENT

Federal cases construing Federal Rules of Civil Procedure are persuasive authority in construing the Alabama Rules of Civil Procedure *Borders v. City of Huntsville*, 875 So. 2d 1168, 1176 n2 (Ala. 2003); *Ex parte Maple Chase Company*.

Rule 37 A.R.Civ.P. provides the method for dealing with a party's failure to comply with discovery. *Iverson v. Xpert Tune, Inc.*, 553 So. 2d 82, 88 (Ala. 1989). Under the terms of Rule 37 when a party fails to respond to interrogatories, the party propounding them may seek a court order by a motion to compel the interrogated party to respond to the discovery pursuant to Rule 37(a)(2) A.R.Civ.P. The party propounding the interrogatories must first file a motion to compel responses to the interrogatories under Rule 37(a) and obtain a court order compelling the discovery that is violated by the interrogated party before the court has authority to impose discovery sanctions for the violation of the order under Rule 37(b). *Dutton v. Dutton*, 446 So. 2d 615, 618 (Ala. Civ. App. 1983).

At the time the trial judge granted BK&W's Motion to Show Cause and subsequently granted BK&W's Motion for sanctions and imposed the sanctions of default against Manci on BK&W's Complaint and Dismissal of Manci's Counterclaim, the trial judge had made no Rule 37(a) order compelling Manci to provide any discovery to BK&W.

A trial judge has no authority to impose Rule 37(d) discovery sanctions against an interrogated party when the interrogated party did not fail to serve answers or objections to interrogatories notwithstanding the trial judge's finding that many of the objections were meritless or were interposed in bad faith. *Fjelestad v. American Motor Company*, 762 F.2d 1334 (9th Cir. 1985).

Rule 37(b) sanctions may be imposed only for disobedience of a valid order. Disobedience of an invalid order is not sanctionable. *Holcombe v. Allis-Chalmers Corp.*, 774 F.2d 398 (10th Cir. 1985).

The trial judge exceeded his authority in imposing the discovery sanctions of default and dismissal of Manci's Counterclaim and in denying Manci's Rule 55(c) motion to set aside those discovery sanctions.

Respectfully submitted,

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# APPENDIX A

William A. Manci v. Ball, Koons & Watson, a partnership
1061370

SUPREME COURT OF ALABAMA

2008 Ala. LEXIS 97

May 23, 2008, Released

JUDGES: SEE, Jusitce. Cobb, C.J., and Woodall, Smith, and Parker, JJ., concur.

OPINION BY: SEE

OPINION

SEE, Justice.

William A. Manci appeals from the entry of a default judgment in favor of Ball, Koons & Watson, a partnership formed for the practice of law ("BK&W"), on its claims against Manci and from the dismissal of Manci's counterclaims against BK&W. We affirm.

Facts and Procedural History

In 1998, Manci retained Ball & Koons, Attorneys at Law (now BK&W), to represent him in litigation regarding the estate of Arthur Manci ("the estate"). When BK&W's legal fees exhausted Manci's original retainer, Manci and BK&W entered into a contingent-fee agreement providing that Manci would pay BK&W a fee of ⅓ of the value of any assets or sums Manci recovered or was awarded as a result of the

litigation. Following the litigation, Manci refused to make any payment under the contingent-fee agreement. In May 2004, BK&W sued Manci, the estate, and other persons and entities associated with the estate seeking the payment of fees for legal services BK&W had provided to Manci. Manci brought a counterclaim against BK&W and its individual attorneys, alleging legal malpractice and requesting a judgment declaring that BK&W was not entitled to the payment of any legal fees.

In February 2005, BK&W submitted its first discovery requests to Manci. Manci did not respond. In June 2005, BK&W moved the trial court to compel Manci to respond to the discovery requests. In March 2006, the trial court ordered that all pending discovery be completed within 30 days. In April 2006, BK&W noticed the deposition of Manci, but he failed to respond to the notice or to appear for the deposition. Manci then amended his answer and counterclaim and responded to BK&W's first set of interrogatories with a series of objections and vague responses.

In July 2006, BK&W filed a motion to show cause why Manci should not be held in contempt for his nonresponsive replies to BK&W's discovery requests. The trial court granted the show-cause motion in September 2006. Manci moved the trial court to vacate its order and to enter a protective order. On January 2, 2007, the trial court held a hearing on the outstanding motions of all the parties, subsequent to which it ordered Manci to complete his responses to

discovery by January 19, 2007, and set February 2, 2007, as the date for Manci's deposition. Manci responded by petitioning this Court for the writ of mandamus declaring that the trial court had exceeded its discretion by ordering Manci to complete his responses to BK&W's discovery requests. We denied that petition without an opinion on February 27, 2007 (case no. 1060633).

On January 31, 2007, BK&W moved for sanctions against Manci for his failure to comply with the trial court's discovery orders. On February 2, 2007, the trial court entered an order finding that "[a]s of the date of this Court Order, [Manci] still refuses to provide any answers to discovery as ordered by this Court in it[ ]s order of January 8, 2007." Based on this finding, the trial court entered a default judgment against Manci on BK&W's claims, dismissed Manci's counterclaims with prejudice, and awarded BK&W damages in the amount of $1,212,045.78 based on the contingent-fee agreement. Manci moved to set aside the trial court's default judgment. The trial court denied that motion, and Manci now appeals.

Issues

Manci presents five issues on appeal. First, Manci argues that the trial court exceeded its discretion by entering a default judgment on BK&W's claims and by dismissing Manci's counterclaims as a sanction for Manci's failure to comply with the trial

court's discovery orders. Second, Manci argues that his failure to submit discovery was harmless because, he says, BK&W never properly replied to Manci's amended counterclaim and, thus, admitted the averments of the counterclaim. Third, Manci argues that the trial court erred in granting BK&W's motion to tax Manci with fees for an expert witness incurred during BK&W's representation of Manci. Fourth, Manci argues that BK&W presented no admissible evidence to support the award of damages against him. Fifth, Manci argues that the record does not support the trial court's finding that Manci's responses to discovery were not made in good faith.

Standard of Review

In reviewing a trial court's denial of a motion to set aside a default judgment, this Court has stated:

> "A trial court has broad discretion in deciding whether to grant or deny a motion to set aside a default judgment. *Kirtland v. Fort Morgan Auth. Sewer Serv., Inc.*, 524 So. 2d 600 (Ala. 1988). In reviewing an appeal from a trial court's order refusing to set aside a default judgment, this Court must determine whether in refusing to set aside the default judgment the trial court exceeded its discretion. 524 So. 2d at 604. That discretion, although broad, requires the trial court to balance two competing policy interests associated with default judgments: the need to promote judicial economy and a litigant's right to defend an action on the merits. 524

So. 2d at 604. These interests must be balanced under the two-step process established in *Kirtland.*

"We begin the balancing process with the presumption that cases should be decided on the merits whenever it is practicable to do so. 524 So. 2d at 604. The trial court must then apply a three-factor analysis first established in *Ex parte Illinois Central Gulf R.R.,* 514 So. 2d 1283 (Ala. 1987), in deciding whether to deny a motion to set aside a default judgment. *Kirtland,* 524 So. 2d at 605. The broad discretionary authority given to the trial court in making that decision should not be exercised without considering the following factors: '1) whether the defendant has a meritorious defense; 2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and 3) whether the default judgment was a result of the defendant's own culpable conduct.' 524 So. 2d at 605."

*Zeller v. Bailey,* 950 So. 2d 1149, 1152-53 (Ala. 2006).

Analysis

I.

First, we address Manci's argument that the trial court exceeded its discretion in entering a default judgment on BK&W's claims and in dismissing Manci's counterclaims as a sanction for Manci's failure to comply with the trial court's discovery orders.

A. Meritorious Defense

In clarifying the meritorious-defense requirement for reviewing a trial court's refusal to set aside a default judgment, this Court has stated:

> "To be more precise, a defaulting party has satisfactorily made a showing of a meritorious defense when allegations in an answer or in a motion to set aside the default judgment and its supporting affidavits, if proven at trial, would constitute a complete defense to the action, or when sufficient evidence has been adduced either by way of affidavit or by some other means to warrant submission of the case to the jury.
>
> "The allegations set forth in the answer and in the motion must be more than mere bare legal conclusions without factual support; they must counter the cause of action averred in the complaint with specificity – namely, by setting forth relevant legal grounds substantiated by a credible factual basis."

*Kirtland,* 524 So. 2d at 606 (citations omitted). In the trial court's order denying Manci's motion to set aside the default judgment and the dismissal of Manci's counterclaims, the trial court found that Manci had "failed to set forth with sufficient particularity a plausible legal defense based upon (1) a viable legal theory, and (2) a strong factual basis to counter [BK&W]'s Cause of Action. [Manci]'s mere allegation that he has a meritorious defense is insufficient."

The record supports the trial court's order. Manci's motion to set aside the judgment makes only one allegation: "The contents of the combined motions creates a genuine issue as to whether Manci or his counsel has engaged in culpable conduct." Because Manci's motion presents "mere bare legal conclusions without factual support," *Kirtland*, 524 So. 2d at 606, we turn to Manci's amended answer and counterclaim to determine whether they show a meritorious defense.

Manci's amended answer and counterclaim aver three affirmative defenses. First, Manci offers a bare allegation that BK&W fails to state a claim upon which relief can be granted. This allegation is insufficient as a basis on which to set aside the default judgment. Second, Manci asserts that BK&W's claims are barred because the complaint "fails to allege that BK&W performed all of BK&W's obligations and conditions precedent to BK&W's right to recover under the [contingent-fee agreement]." This second assertion, however, is factually incorrect. BK&W's complaint states that BK&W "substantially performed all of the terms required of it under the terms of said [contingent-fee agreement] and a dispute has arisen concerning the amount [Manci] owes [BK&W] for legal services rendered." Manci's third defense is that BK&W forfeited the right to compensation by engaging in abusive and overreaching misconduct in its attempt to collect the disputed legal fees. However, Manci offers no legal basis for this contention.

Therefore, this claim too is insufficient to demonstrate that Manci has a meritorious defense.

Manci asserted two claims in his counterclaim. Manci alleges a legal-services-liability claim against BK&W, alleging numerous breaches of the standard of care applicable to BK&W. However, this Court has consistently held that ""'in a legal malpractice case, the plaintiff must show that but for the defendant's negligence he would have recovered on the underlying cause of action. . . .'"" *Dennis v. Northcutt*, 923 So. 2d 275, 279 (Ala. 2005) (quoting *Independent Stave Co. v. Bell, Richardson & Sparkman, P.A.* 678 So. 2d 770, 772 (Ala. 1996), quoting in turn *McDuffie v. Brinkley, Ford, Chestnut & Aldridge*, 576 So. 2d 198, 199 (Ala. 1991)). Not only does Manci not allege that he failed to recover on the underlying matter as the result of BK&W's negligence, but his counterclaim also repeatedly refers to BK&W's "successful" handling of his case.

Manci also seeks in his counterclaim a judgment declaring that BK&W is not entitled to attorney fees under the terms of the contingent-fee agreement he entered into with BK&W. However, BK&W's complaint seeks to recover all expenses and legal fees arising from its representation of Manci, not just those due under the contingent-fee agreement. In fact, Manci's counterclaim admits that "BK&W is entitled to be compensated for those legal representations of him on the basis of quantum meruit instead of a contingent fee." By Manci's own admission, his defenses and counterclaims are not a complete

defense to BK&W's action; therefore, Manci fails to meet the meritorious-defense requirement of a challenge to the default judgment.

B. Prejudice to the Nondefaulting Party

This Court has stated:

> "'The setting aside of a default judgment delays a final termination of the litigation. This delay frustrates or impedes a plaintiff's efforts to recover on his claim and causes him to incur additional costs. Moreover, the delay may facilitate fraud and collusion, result in loss of evidence, and hinder discovery.'"

*Zeller v. Bailey,* 950 So. 2d 1149, 1153 (Ala. 2006) (emphasis omitted) (quoting *Kirtland,* 524 So. 2d at 606-07). On this factor, the trial court found that BK&W would be prejudiced if the default judgment were to be set aside because "[t]he Court is convinced that [Manci] will never comply with the Rules of Civil Procedure or the Orders of this Court if the Default Judgment is set aside." Moreover, the record indicates that the trial court held a hearing on March 6, 2007, to determine the amount of damages arising from the default judgment and, after the hearing, entered an order setting damages in the amount of $1,212,045.78. On March 26, 2007, Manci filed an untimely "Notice of Disclaimer" with the circuit court, attempting to disclaim his interest in the estate, which was deposited with the clerk of the circuit court pending the resolution of this case. Although

the trial court rejected this disclaimer as "ineffective and for naught," it demonstrates that Manci has attempted to divest himself of assets from which the judgment in favor of BK&W might be paid. Because further delay in bringing this case to resolution could result in further attempts by Manci to "facilitate fraud," setting aside the default judgment would unfairly prejudice BK&W.

C. Culpability of the Defaulting Party's Conduct

This Court has stated in regard to the culpability factor:

> "To warrant a refusal to set aside a default judgment, the defaulting party's actions that resulted in the entry of the default judgment must constitute willful conduct or conduct committed in bad faith. Negligence alone is not sufficient. Bad faith or willfulness is identified by 'incessant and flagrant disrespect for court rules, deliberate and knowing disregard for judicial authority, or intentional nonresponsiveness.' *Kirkland [v. Fort Morgan Auth. Sewer Serv., Inc.]*, 524 So. 2d [600] at 608 [(Ala. 1988)] (citing *Agio Indus., Inc. v. Delta Oil Co.*, 485 So. 2d 340, 342 (Ala. Civ. App. 1986)). A trial court's finding with respect to the culpability of the defaulting party is subject to great deference. *Jones v. Hydro-Wave of Alabama, Inc.*, 524 So. 2d 610, 616 (Ala. 1988)."

*Zeller,* 950 So. 2d at 1154. The trial court stated that "[Manci] has failed to offer any reasonable explanation why the discovery responses have not been forthcoming. This Court has never witnessed such incessant and flagrant disrespect for Court rules or deliberate and knowing disregard for judicial authority, or more intentional non-responsiveness than of [Manci] in this case." On appeal, Manci appears to argue that the trial court erred by granting BK&W's motion for a default judgment without ever having ordered him to respond to the discovery requests pursuant to Rule 37(a), Ala. R. Civ. P., which provides the circumstances under which a party may move the court to compel discovery. Manci's allegation that he was not ordered to respond to discovery is, however, incorrect. The record indicates that BK&W first moved the trial court to compel discovery on June 17, 2005. The trial court entered an order on September 15, 2006, under which Manci was ordered "to fully and completely answer the interrogatories as propounded on or before October 15, 2006." The trial court entered a second order compelling discovery on January 8, 2007. BK&W then moved for sanctions against Manci on January 31, 2007. The trial court granted that motion on February 2, 2007. Manci has offered no reasonable explanation for his failure to comply with the trial court's discovery orders. After reviewing the arguments of the parties and the record in this case, we hold that the trial court did not exceed its discretion in finding that Manci's conduct was willful and committed in bad faith and

warranted the sanctions of the entry of a default and the dismissal of his counterclaim.

II.

Second, Manci argues that his failure to submit proper discovery responses was harmless because, he says, BK&W never properly replied to his amended counterclaim, and, thus, it admitted the averments of the counterclaim. Manci bases this argument on Rule 8(d), Ala. R. Civ. P., which provides, in relevant part, that "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." In *Hawk v. Bavarian Motor Works,* 342 So. 2d 355 (Ala. 1977), this Court dealt with the issue whether "the failure to file a written denial of a pleading to which a response is required, under Rule 8(d), [Ala. R. Civ. P.], admits the allegations of that pleading where the issues tried are embraced in prior pleadings that were responded to in writing." 342 So. 2d at 356. In that case, the plaintiff's original complaint contained six counts related to an allegedly defective motorcycle. The defendant responded to the complaint, denying any negligence. The plaintiff later added a seventh count, alleging that the defendant had notice of the defect. The defendant did not file an answer to this amended complaint. When the case went to trial, the plaintiff moved for a directed verdict (now a judgment as a matter of law, see Rule 50, Ala. R. Civ. P.) on count seven, alleging that the defendant had admitted that

count by not responding as required by Rule 8(b), Ala. R. Civ. P. The trial court denied that motion, and an appeal followed. This Court affirmed the trial court's order denying the motion, stating that "mere failure to file an additional answer to a recast theory of one issue already stated in a previously filed pleading could not reasonably and fairly require strict application of Rule 8(d) to thwart the just determination of this action." 342 So 2d at 357. The Court reasoned that the amended complaint "states nothing so materially different from what is stated in the original complaint so that an answer to the original would not sufficiently answer the amendment." 342 So. 2d at 357. We find *Hawk* to be apposite. Manci's amended counterclaim does not add a new basis of recovery; rather, it appears to amplify the grounds on which Manci based his request for a declaratory judgment on the contingent-fee agreement and his legal-malpractice claim. BK&W's response to Manci's original complaint was adequate; therefore, it did not admit the allegations of the amended counterclaim simply because it failed to reply to Manci's recasting of his theories.

III.

Third, Manci argues that the trial court erred in granting BK&W's motion to tax as costs expert-witness fees incurred during BK&W's representation of Manci as taxable costs against him. The sole authority Manci cites for this allegation of error is *Bundrick v. McAllister,* 882 So. 2d 864 (Ala. Civ. App.

2003). Manci's argument is misplaced. In *Bundrick*, the Court of Civil Appeals held that the successful plaintiff could not tax the defendant with the costs the plaintiff incurred hiring an expert witness necessary to prosecute her claim against the defendant. However, in this case, the expert-witness fees in question were incurred by BK&W on behalf of Manci while he was BK&W's client, not in the prosecution of BK&W's claims against Manci. *Bundrick* is clearly distinguishable, and we affirm the trial court's judgment on this ground as well.

IV.

Fourth, Manci argues that BK&W presented no admissible evidence to support the award of damages against him. However, Manci cites no authority and makes no argument as to the admissibility of any evidence offered at the hearing. Rather, it appears that Manci's argument is that the contingent-fee agreement he entered into with BK&W should not apply to the 60-acre plot of land that was part of the dispute in which BK&W represented Manci against Arthur Manci's estate. The contingent-fee agreement states, in pertinent part:

> "The undersigned, William A. Manci, employs the law firm of [BK&W] to recover by suit or settlement any assets from [the estate]. The undersigned agrees to pay said firm for legal representation, a sum equal to 33 ⅓% of the value of all said assets or sums awarded or recovered on his behalf in said

> litigation or any related litigation, plus expenses, for professional services rendered up to and including the conclusion of (1) trial."

Manci argues that because he was ultimately adjudged to be the rightful owner of those 60 acres, his title to those 60 acres was not an asset the firm recovered on his behalf in the estate litigation; therefore, he argues, BK&W "had no right to claim an attorney's lien against Manci's 60 acres of land." Manci's brief at 59. Manci bases this argument on § 34-3-61(c), Ala. Code 1975,[1] and three cases from this Court. Manci quotes the following from *Warren v. Hill, Hill, Stovall & Carter,* 252 Ala. 638, 639, 42 So. 2d 264, 265 (1949): "The right of attorneys under [Title 46, Ala. Code 1940] section 64, subd. 3, supra [now codified at § 34-3-61(c)], to enforce a lien on the land recovered by plaintiff is dependent upon the proposition that the suit was for the land and resulted in its recovery." He also cites, without quoting, *Ex parte Clanahan,* 261 Ala. 87, 72 So. 2d 833 (1954), and *King v. Acuff,* 218 Ala. 619, 119 So. 833 (1929),

---

[1] Section 34-3-61(c), Ala. Code 1975, provides:

> "Upon all actions for the recovery of real or personal property, and upon all judgments for the recovery of the same, attorneys-at-law shall have a lien on the property recovered, for their fees, superior to all liens but liens for taxes, which may be enforced by said attorneys-at-law, or their lawful representatives, as liens on personal and real estate, and the property recovered shall remain subject to said liens, unless transferred to bona fide purchasers without notice."

for the proposition that "[a]n action filed by an attorney to quiet the title to real property is not an action to recover the property for the client and judgment quieting the title is not a judgment for the recovery of the property." Manci's brief at 58. However, Manci's reliance on these authorities is misplaced. In *Warren,* the Court reached the conclusion that even though the underlying action was to enforce a personal statutory right of redemption, "neither the plaintiff nor defendant is in a position to question the fact of a recovery of the land by plaintiff." 252 Ala. at 640, 42 So. 2d at 265. Manci appears to cite *Clanahan* for its citations to *King,* in which this Court was asked to uphold a statutory attorney's lien against his client's land to secure the payment of the attorney's fee for successfully bringing a quiet title action on behalf of the client. This Court held that "[t]here was no recovery of property; there was only an authoritative and conclusive declaration by the court that defendants there had no interest in the property the subject of litigation. We are unable to find in the statute any purpose to create a lien in such case." 218 Ala. at 620, 119 So. at 833. However, the statute and all the cases cited by Manci deal with an attorney's attempt to enforce a statutory lien on real property. None address the case presented here – where an attorney has not filed a statutory attorney's lien but has an interest in the value of the subject property in reference to a contingent-fee agreement. We note that the contingent-fee agreement between Manci and BK&W entitles BK&W to a fee equal to the value of 33 ⅓% of the assets or sums recovered by or awarded to Manci

in the litigation, not 33 ⅓% of the assets themselves. We further note that the trial court awarded BK&W a monetary sum, not an interest or attorney's lien in any particular asset of Manci's. "'"The determination of whether an attorney fee is reasonable is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion.'"' *Rabb v. Estate of Harris,* 953 So. 2d 401, 405 (Ala. 2006) (quoting *City of Birmingham v. Horn,* 810 So. 2d 667, 681-82 (Ala. 2001), quoting in turn *Ex parte Edwards,* 601 So. 2d 82, 85 (Ala. 1992)). Manci's argument fails to demonstrate that the trial court exceeded its discretion in determining the amount of the attorney-fee award, and we affirm the trial court's judgment on this ground.

V.

Fifth, Manci argues that the record does not support the trial court's finding that Manci's responses of BK&W's discovery requests were not made in good faith. However, Manci fails to provide any citation to authority or argument in support of this allegation. "'"Where an appellant fails to cite to any authority for an argument, this Court may affirm the judgment as to those issues, for it is neither this Court's duty nor its function to perform all the legal research for an appellant.'"' *Ex parte Barnett,* [Ms. 1060174, August 3, 2007] ___ So. 2d ___, ___ (Ala. 2007) (quoting *Birmingham News Co. v. Horn,* 901 So. 2d 27, 28 (Ala. 2004), quoting in turn *Sea Calm Shipping Co. v. Cooks,* 565 So. 2d 212, 216 (Ala.

1990)). Because Manci has not cited any authority in support of his allegation, we affirm the judgment of the trial court on this ground.

Conclusion

Because Manci has not shown that the trial court exceeded its discretion in denying his motion to set aside the default judgment and the dismissal of counterclaims, we affirm the trial court's judgment.

AFFIRMED.

Cobb, C.J., and Woodall, Smith, and Parker, JJ., concur.

## APPENDIX B

IN THE SUPREME COURT OF ALABAMA
June 13, 2008

1061370

William A. Manci v. Ball, Koons & Watson, a partnership (Appeal from Baldwin Circuit Court: CV-04-606).

ORDER

The appellant, William A. Manci, having filed a motion to accept his out-of-time filing of an application for rehearing and a brief in support thereof, and a motion to stay the issuance of the certificate of judgment,

IT IS ORDERED that the motion to accept the appellant's out-of-time application for rehearing is denied.

IT IS FURTHER ORDERED that the motion to stay the issuance of the certificate of judgment is denied as moot.

**APPENDIX C**

**IN THE SUPREME COURT OF ALABAMA**

[SEAL]

**June 10, 2008**

1061370

William A. Manci v. Ball, Koons & Watson, a partnership (Appeal from Baldwin Circuit Court: CV-04-606).

**CERTIFICATE OF JUDGMENT**

(Filed Jun. 13, 2008)

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on May 23rd 2008:

**Affirmed.**

SEE, J. – Cobb, C.J., and Woodall, Smith, and Parker, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that the costs of this cause are hereby taxed against the appellant as provided by Rule 35, Ala. R. App. P.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

## APPENDIX D

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

| | | |
|---|---|---|
| BALL, KOONS & WATSON, a partnership, Plaintiff, | ) | |
| vs. | ) | CASE NO: CV-2004-606 |
| WILLIAM A. MANCI, Defendant, | ) | |
| AND | ) | |
| WILLIAM A. MANCI, Defendant and Counterclaim Plaintiff, | ) | |
| v. | ) | |
| BALL, KOONS & WATSON, a partnership, et al, Plaintiff and Counterclaim Defendants. | ) | |

**ORDER**

(Filed May 3, 2007)

This matter having come before the Court on the Motion of William A. Manci to Set Aside Default Judgment and Dismissal of Amended Counterclaim, the Court having considered the same and the Plaintiff's response thereto and the Court finding as follows:

1. In his motion, the Defendant failed to set forth with sufficient particularity a plausible legal defense based upon (1) a viable legal theory, and (2) a strong factual basis to counter the Plaintiff's Cause of Action. The Defendant's mere allegation that he has a meritorious defense is insufficient.

2. The Plaintiff would be prejudiced if the Default Judgment is Set Aside. The Court believes that the entry of a Default Judgment in this matter was the only reasonable sanction available to impose against the Defendant. Otherwise, this case would never be properly prepared for trial. In its January 31, 2007 Order, the Court entered a number of findings relative to the Plaintiff's attempt to obtain bonafide discovery in this action. The Court is convinced that the Defendant will never comply with the Rules of Civil Procedure or the Orders of this Court if the Default Judgment is Set Aside. The Defendant has had numerous opportunities to comply with discovery and even as this Order is being entered, the Defendant has never complied with discovery requests or the Orders of this Court providing the same.

3. The Default Judgment entered against the Defendant is due to the Defendant's culpable conduct. Despite numerous Orders of this Court, the Defendant has incessantly and flagrantly disregarded the Rules of Civil Procedure and the Orders of this Court. Again, s [sic] recitation of these matters are set forth in the Court's Order of January 31, 2007. The Court again notes that the Defendant has yet to comply

with these Orders even though he has had numerous opportunity to do so. Further, the Court notes that the Defendant has failed to offer any reasonable explanation why the discovery responses have not been forthcoming. This Court has never witnessed such incessant and flagrant disrespect for Court rules or deliberate and knowing disregard for judicial authority, or more intentional non-responsiveness than of the Defendant in this case.

For the reasons aforesaid, the Defendant's Motion to Set Aside Default Judgment is hereby DENIED.

DONE this the 1 day of May, 2007.

/s/ N. Pride Tompkins
N. PRIDE TOMPKINS

## APPENDIX E

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

BALL, KOONS & WATSON
A partnership
Plaintiff

CASE NO: CV-2004-606

VS

WILLIAM A. MANCI
Defendant

### FINAL DECREE

(Filed Mar. 22, 2007)

THIS MATTER coming before the Court for a hearing to establish damages to which the Plaintiff, Ball, Koons, & Watson, a Partnership, is entitled in the above styled cause of action, and with the parties being present with their respective attorneys, and with testimony and evidence being taken on the 16th day of March, 2007 and the Court considering the same it is hereby ORDERED, ADJUDGED, and DECREED that a judgment is hereby entered in favor of the Plaintiff Ball, Koons, & Watson, a Partnership and against the Defendant, William A. Manci, in the sum of One Million Two Hundred Twelve Thousand Forty Five Dollars and Seventy Eight Cents ($1,212,045.78).

It is further ORDERED, ADJUDGED, and DECREED that the Clerk of the Circuit Court of Baldwin County, Alabama shall disburse to the Law Firm

of Brackin, McGriff, and Johnson, P.C. as attorneys for the Plaintiff all sums held by the clerk in this action as heretofore ordered by the Hon. James H. Reid on December 20, 2006, in that case styled *In Re: The Estate of Arthur Manci, Deceased*, CV-1994-786.

It is further ORDERED, ADJUDGED, and DECREED that the costs of these proceedings shall be taxed to the Defendant for which execution may issue.

Done this 19th day of March, 2007.

/s/ N. Pride Tompkins
N. PRIDE TOMPKINS
ASSIGNED CIRCUIT JUDGE

**APPENDIX F**

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

BALL, KOONS & WATSON
A partnership
Plaintiff

CASE NO: CV-2004-606

VS

WILLIAM A. MANCI
Defendant

COURT ORDER

WHEREAS, the Court entered an order in the above styled case dated the 31st day of January, 2007 reserving to set another hearing on damages.

THEREFORE, it is ORDERED, ADJUDGED, and DECREED that a hearing for damages is set for a hearing on the 16th day of March, 2007 at 10:00 A.M. in the Fairhope, Alabama Courthouse.

Done the 6th day of March, 2007.

/s/ N. Pride Tompkins
N. PRIDE TOMPKINS
ASSIGNED CIRCUIT JUDGE

cc: Joseph J. Boswell
Julian B. Brackin
Circuit Clerk
By fax & U.S. Mail

## APPENDIX G

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

BALL, KOONS & WATSON
A partnership
Plaintiff

CASE NO CV-2004-606

VS

WILLIAM A. MANCI
Defendant

## COURT ORDER

(Filed Feb. 2, 2007)

This cause coming before the Court on the Motion for Sanctions for Failure to Comply with Discovery and the Court considering the same, the Court makes the following findings:

1. The Plaintiffs propounded interrogatories to the Defendant on February 16, 2005, and,

2. On May 24, 2005, counsel for the Plaintiff's wrote counsel for Defendant and asked him to please provide full and complete answers to discovery. No answers were forthcoming, and,

3. On June 17, 2005, when no answers to discovery were forthcoming, the Plaintiff's counsel filed a Motion to Compel, and,

4. On April 26, 2006, the Defendant's counsel provided answers that were later called by this Court, "non-responsive and not in good faith." and,

5. On July 14, 2006, counsel for Plaintiffs filed Motion to Show Cause, asking that the Court enter an Order directing the Defendant to fully and completely answer the interrogatories as propounded on or before a date certain, or thereafter, appear before the Court to show cause as to why he should not be held in contempt, and,

6. On September 12th, 2006, this Court entered an Order directing that the Defendant fully and completely answer the interrogatories as propounded by the Plaintiffs on or before October 16, 2006, or appear before the Court on that day to show cause as to why he should not be held in contempt, and,

7. On October 11, 2006, the Defendant filed a Motion to Vacate the Court's preview discovery order to show cause and Motion for a Protective Order, and,

8. On December 6, 2006, Hon. James H. Reid, acting on behalf of me, N. Pride Tompkins the assigned Judge for this case entered an order setting all pending motions for January 2, 2007, and,

9. The attorneys for the parties appeared in court on January 2, 2007 and made arguments to the court on the pending motions which was transcribed by a court reporter, and,

10. The Court entered an Order on January 8, 2007 wherein it was stated that the Defendant's answers to discovery were non-responsive and not made in good faith, and,

11. In the Court's Order the Defendant was ordered to provide Plaintiff with full complete answers to discovery on or before the 19th day of January, 2007.

12. As of the date of this Court Order, the Defendant still refuses to provide any answers to discovery as ordered by this Court in it's order of January 8, 2007.

It is therefore ORDERED, ADJUDGED, and DECREED that a default judgment is entered on behalf of the Plaintiffs and against the Defendant herein. A hearing on damages is to be set by a separate order.

It is further ORDERED, ADJUDGED, and DECREED that the Defendant's Counter-claim is due to be, and is hereby DISMISSED WITH PREJUDICE.

DONE this the 31st day of January, 2007

/s/ N. Pride Tompkins
N. PRIDE TOMPKINS
Assigned Circuit Judge

## APPENDIX H

## IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

| | | |
|---|---|---|
| **BALL, KOONS & WATSON, a partnership,** | § | |
| **Plaintiff,** | § | |
| **v.** | § | **CASE NO.: CV-2004-606** |
| **WILLIAM A. MANCI,** | § | |
| **Defendant.** | § | |
| **WILLIAM A. MANCI,** | § | |
| **Defendant and Counter Plaintiff,** | § | |
| **v.** | § | |
| **BALL, KOONS & WATSON, an Alabama partnership; E.E. Ball; Harold A. Koons, III; and Russell J. Watson, individually, said persons being all of the attorney partners in Ball, Koons & Watson partnership, jointly and separately, Plaintiff-Counter-Defendant and additional Counter-Defendants.** | § | |

## MOTION FOR SANCTIONS FOR FAILURE TO COMPLY WITH DISCOVERY ORDERS

(Filed Jan. 31, 2007)

COMES NOW the Plaintiffs, by and through their undersigned attorney of record, and would make this, their Motion to Sanctions for Failure to Comply with Discovery Orders, and would show unto this Honorable Court as follows:

1. Plaintiffs propounded interrogatories to the Defendant on February 16, 2005.

2. On May 24, 2005, counsel for the Plaintiff's wrote counsel for Defendant and asked him to please provide full and complete answers to discovery. No answers were forthcoming.

2 [sic]. On June 17, 2005, when no answrs to discovery were forthcoming, the Plaintiff's filed a Motion to Compel.

3. On April 26, 2006, the Defendant's provided answers that were later called by this Court, "non-responsive and not in good faith."[1]

4. On July 14, 2006, counsel for Plaintiffs filed a Motion to Show Cause, asking that the Court enter an Order directing the Defendant to fully and completely answer the interrogatories as propounded on or before a date certain, or, thereafter, appear before the

---

[1] *See* Order of the Court, dated January 8, 2007, Paragraph Two (2) wherein the Court stated, "The responses received by the Plaintiff's interrogatories are non-responsive and not in good faith."

Court to show cause as to why he should not be held in contempt.

5. On September 12th, 2006, this Court entered an Order directing that the Defenadnt fully and completely answer the interrogatories as propounded by the Plaintiffs on or before October 16, 2006, or appear before the Court on that day to show cause as to why he should not be held in Contempt.

6. On October 11, 2006, the Defendant filed a Motion to Vacate the Court's previous discovery order to show cause and Motion for a Protective Order.

7. On December 6, 2006, Hon. James H. Reid, acting on behalf of Judge Tompkins, entered and [sic] Order setting all pending Motions for January 2, 2007.

8. After the hearing on January 2, 2007, the Court entered an Order on Janaury 8, 2007, wherein it was stated that the Defendant's answers to discovery were non-responsive and not made in good faith.

9. The Defendant was to provide full and complete answers to the discovery as propounded on or before January 19, 2007.

10. As of the date of the filing of this Motion, the Defendant still refuses to provide any answers to discovery as ordered by this Court in it's order of January 8, 2007.

WHEREFORE, the above premises considered, the Plaintiffs would pray this Honorable Court to enter an Order granting them a default judgment

against the Defendant; would set this matter for a hearing as to damages at the earliest time convenient to the Court; and dismiss the Defendant's Counterclaim against the Plaintiffs, with prejudice; and would grant the Plaintiffs any other, further, and different relief to which they may be entitled, the premises considered.

Respectfully submitted,

*/s/ Julian B. Brackin*
JULIAN B. BRACKIN
(BRA033)
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this the 30th day of January, 2007, served a copy of the foregoing on the following by placing the same in the U.S. Mail, and via hand delivery, properly addressed and postage paid:

Joseph J. Boswell
Joseph J. Boswell, P.C.
Post Office Box 1112
Mobile, Alabama 36633-1112

*/s/ Julian B. Brackin*
JULIAN B. BRACKIN
(BRA033)

OF COUNSEL:
BRACKIN, MCGRIFF and JOHNSON, P.C.
P.O. BOX 998
FOLEY, AL 36536
251-943-4040
brackinlaw@gulftel.com

## APPENDIX I

## IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

| | | |
|---|---|---|
| BALL, KOONS & WATSON, a partnership, | * | |
| Plaintiff, | * | **CASE NO: CV-2004-606** |
| vs. | * | |
| WILLIAM A. MANCI; | * | |
| Defendant. | * | |

---

| | | |
|---|---|---|
| William A. Manci, | * | |
| Defendant and Counter Plaintiff, | * | |
| vs. | * | |
| Ball, Koons & Watson, an Alabama partnership; E.E. Ball; Harold A. Koons, III; and Russell J. Watson, individually, said individuals being all of the attorney partners in the Ball, Koons & Watson partnership, jointly and separately, | * | **CASE NO: CV-2004-606** |
| Plaintiff and Counter-Defendant and additional Counter-Defendants. | * | |

## MOTION TO STAY PROCEEDINGS PENDING DISPOSITION BY ALABAMA SUPREME COURT OF PETITION FOR WRIT OF MANDAMUS AND MOTION TO STAY

(Filed Jan. 19, 2007)

Comes Now the Defendant and Counter-Plaintiff William A. Manci (hereinafter "Manci") and files this Motion to Stay Proceedings Pending Disposition by Alabama Supreme Court of Petition for Writ of Mandamus and Motion to Stay. As grounds for this motion Manci assigns the following:

1. On January 8, 2007, Judge N. Pride Tompkins, the Assigned Circuit Judge in this case, signed an Order which was filed in this case on January 10, 2007, wherein he ordered that Defendant and Counter-Plaintiff Manci provide full and complete answers to the discovery of the Plaintiff and Counter-Defendant Ball, Koons & Watson, a partnership, on or before January 19, 2007, or otherwise be found in contempt for his failure to do so. A copy of that Order is attached hereto and is incorporated herein by reference thereto.

2. Counsel for Manci will file a Petition for a Writ of Mandamus and the Attachments in support thereof on the date hereof under the "deemed filed" rule of appellate procedure unless the printer is unable to make the required number of copies and bind them in accordance with the requirements of the applicable rules of appellate procedure in sufficient time for Manci to mail the same by United States

certified mail, return receipt requested. It will be necessary for the printer to make sixteen copies of the original petition for writ of mandamus and bind the same with a spiral binder, and to also make sixteen copies of the Attachments to be filed in support of the petition in a separate sprial binder; in which event counsel for Manci will file all of the under the "deemed filed" rule on January 20, 2007.

3. In the petition Manci prays that the Alabama Supreme Court will grant the petition and direct the writ of mandamus to Judge Tompkins commanding him to vacate his subject discovery Order, and for other relief.

Wherefore, Manci prays that this motion be granted and that all further proceedings in this case be stayed pending disposition of the petition for writ of mandamus.

A copy of this motion will be attached as a Attachment with the petition.

Joseph J. Boswell, P.C.
P.O. Box 1112
Mobile, Alabama 36633-1112
Telephone: (251) 432-9458
Facsimile: (251) 432-9979
E-mail: jboswell@zebra.net

/s/ Joseph J. Boswell
Joseph J. Boswell (BOS005)
Attorney for
William A. Manci

**CERTIFICATE OF SERVICE**

I, the undersigned attorney, do hereby certify that on the 19th day of January, 2007, I served a copy of the foregoing Motion to Stay Proceedings Pending Disposition by Alabama Supreme Court of Petition for Writ of Mandamus and Motion to Stay on the below named counsel of record for the plaintiff and all of the Counter-Defendants at the stated address by depositing a copy of the same in the United States mail, properly addressed, and first class postage prepaid:

Julian B. Brackin, Esq.
BRACKIN, McGRIFF AND
JOHNSON, P.C.
Post Office Box 998
Foley, Alabama 36536

/s/ Joseph J. Boswell
Joseph J. Boswell (BOS005)

## APPENDIX J

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

BALL, KOONS & WATSON
A partnership,
Plaintiff CASE NO: CV-2004-606

vs.

WILLIAM A MANCI
Defendant

## ORDER OF THE COURT

(Filed Jan. 10, 2007)

This cause coming before the Court on the Plaintiff's Motion to Show Cause and with the attorneys appearing in Court and making arguments to the Court, the Court makes the following findings:

1. The Plaintiff propounded to the Defendant on February 14, 2005 interrogatories to be answered.

2. The responses received by the Plaintiff's interrogatories are non-responsive and not in good faith.

The Court considering these findings and the arguments of the attorneys, it is THEREFORE, ORDERED, ADJUDGED, and DECREED that the Defendant William A. Manci shall provide full and complete answers to the discovery on or before the 19th day of January, 2007 or otherwise be found in contempt for his failure to do so.

It is furthered ORDERED, ADJUDGED, and DECREED that the Deposition of William A. Manci and Gwin Manci shall take place at the offices of Brackin, McGriff, and Johnson, P.C., on February 2, 2007 and February 5, 2007, respectively, and shall continue from day to day until completed.

It is furthered ORDERED, ADJUDGED, and DECREED that the parties shall provide the names and address of their respective experts to the other on or before the 15th day of February, 2007 and the depositions of the parties' respective experts shall take place on the 22nd day of February, 2007, at the office of Brackin, McGriff, and Johnson, P.C.

It is further ORDERED, ADJUDGED, and DECREED that the Defendant/Counter-claim Plaintiff shall take the 30(b)(6) deposition of the Plaintiff/Counter-claim Defendant on March 21, 2007, at the office of Brackin, McGriff, and Johnson, P.C. The depositions of Mr. Ball, Mr. Koons, and Mr. Watson, individually, shall be taken on March 22, and March 23, 2007.

It is further ORDERED, ADJUDGED, and DECREED the last day for either party to file dispositive motions is April 13, 2007 and responses thereto are due on or before April 20, 2007.

It is further ORDERED, ADJUDGED, and DECREED that this case is set for a final trial during the first week of jury trial in May 2007 unless otherwise notified by the Court.

It is further ORDERED, ADJUDGED, and DECREED that a pre-trial ordered be submitted to Court by the attorneys on or before one week prior to the trial date.

Done this 8th day of January, 2007.

/s/ N. Pride Tompkins
N. PRIDE TOMPKINS
CIRCUIT JUDGE

cc: Julian Brackin
Joseph Boswell

## APPENDIX K

***JOSEPH J. BOSWELL, P.C.***
**A Professional Corporation**

JOSEPH J. BOSWELL
ATTORNEY AT LAW
MOBILE, ALABAMA

TELEPHONE: (251) 432-9458
FACSIMILE: (251) 432-9979
EMAIL:jboswell@zebra.net

MAILING ADDRESS:
P.O. BOX 1112
MOBILE, ALABAMA
36633

September 16, 2006

The Honorable N. Pride Thompkins [sic]
Circuit Judge
180 Carolyn Road
Muscle Shoals, Alabama 35661

**Re: Ball, Koons & Watson v. William A. Manci**
**Baldwin County Circuit Court Case**
**No. CV-2004-606**

Dear Judge Thompkins [sic]:

I received a copy of Mr. Backin's letter to you dated September 7, 2006, requesting that you rule on his Motion to Show Cause, with an enclosed proposed Order for you to sign granting the motion.

There is no provision in the Alabama Rules of Civil Procedure for the filing of a motion to show cuase when an adverse party does not provide all of the discovery requested by stating objection(s) to a discovery request and the reason(s) therefor. I responded to each of Mr. Brackin's discovery requests

in the manner required by the discovery rules in the Rules of Civil Procedure.

I respectfully suggest to Your Honor that I am entitled to a hearing on Mr. Brackin's Motion to Show Cuase.

Sincerely, yours,

/s/ Joseph J. Boswell
Joseph J. Boswell

JJB/jb

pc: Julian B. Brackin, Esq.

## APPENDIX L

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

| | |
|---|---|
| BALL, KOONS & WATSON, a partnership,<br>Plaintiff,<br>vs.<br>WILLIAM A. MANCI,<br>Defendant | CASE NO: CV-2004-606 |
| WILLIAM A. MANCI,<br>Defendant and Counter Plaintiff<br>v.<br>WILLIAM A. MANCI, THE ESTATE OF ARTHUR MANCI, deceased, THE TRUSTEES OF TRUST A & B created under the Last Will and Testament of ARTHUR MANCI, deceased and JEANETTE MANCI TORBERT, ELIZABETH MANCI GARDNER, MARY SUE MANCI and JOSEPH A. MANCI, meaning and intending to name the beneficiaries of the ESTATE OF ARTHUR MANCI, deceased and any Trust created in the Last Will and Testament of | |

ARTHUR MANCI, deceased, JOHN DOE I, JOHN DOE II, JOHN DOE III, meaning an [sic] intending to describe those persons acting in concert with the defendant, including his attorneys and other advisors who have conspired to deprive the plaintiff of legal fees as more particularly described hereinbelow, whose identity is presently unknown but who will be added by amendment when ascertained,

Defendants.

**ORDER**

(Filed Sep. 15, 2006)

The Motion to Show Cause having come before the Court and found to be well taken, it is hereby GRANTED and the Defendant is hereby ORDERED to fully and completely answer the interrogatories as propounded on or before October 16 2006 or it is hereby ORDERED that the Defendant appear before this Court on October 16, 2006 at the Foley courthouse at 10:00 am/pm to show cause as to why he should not be placed in the Baldwin County Jail for failure to comply with the previous discovery Orders of this Court.

Done this 12th day of Sept., 2006.

/s/ N. Pride Thompkins
N. PRIDE THOMPKINS
CIRCUIT JUDGE

## APPENDIX M

LAW OFFICES
BRACKIN, McGRIFF AND JOHNSON, P.C.
150 WEST SECTION AVENUE
POST OFFICE BOX 998
FOLEY, ALABAMA 36536
(251) 943-4040
FACSIMILE: (251) 943-6140

JULIAN B. BRACKIN
KELLY A. McGRIFF
STEPHEN P. JOHNSON*
*ALSO ADMITTED
IN MISSISSIPPI

E-MAIL ADDRESSES:
brackinlaw@gulftel.com
jbbrackinjr@aol.com
kelmcgriff@aol.com
sjohnson4040@yahoo.com

September 7, 2006

The Honorable N. Pride Thompkins [sic]
180 Carolyn Road
Muscle Shoals, AL 35661

Re: Ball, Koons & Watson v. Manci
Baldwin County Circuit Court Case
No. CV-2004-606

Dear Judge Thompkins [sic]:

We seem to be at a standstill in the above case for the simple reason that we cannot get the defendant's attorney to produce requested discovery. In an effort to get this case moving, on July 13, 2006, we filed a Motion to Show Cause, via electronic filing. A copy of said Motion is enclosed herewith.

Your Honor has not yet ruled on this Motion and we are urging you to do so. Electronic filings do not

print out a [sic] Order and we are taking the liberty of sending one with this correspondence for Your Honor's convenience.

If there is anything we need to do to expedite the finalizing of this case, please advise us.

Yours very truly,

/s/ Julian B. Brackin
JULIAN B. BRACKIN

JBB:mg
enclosures

cc: Joseph J. Boswell, Esq.
Ball, Koons & Watson

---

**ORDER**

The Motion to Show Cause having come before the Court and found to be well taken, it is hereby GRANTED and the Defenadnt is hereby ORDERED to fully and completely answer the interrogatories as propounded on or before _____ 2006 or it is hereby ORDERED that the Defendant appear before this Court on _____ at the _____ courthouse at _____ am/pm to show cause as to why he should not be placed in the Baldwin County Jail for failure to comply with the previous discovery Orders of this Court.

Done this ___ day of _____, 2006.

_____
N. PRIDE THOMPKINS [sic]
CIRCUIT JUDGE

## APPENDIX N

## IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

| | | |
|---|---|---|
| **BALL, KOONS & WATSON, a partnership,** | § | |
| **Plaintiff,** | § | |
| **v.** | § | **CASE NO.: CV-2004-606** |
| **WILLIAM A. MANCI,** | § | |
| **Defendant.** | § | |
| **WILLIAM A. MANCI,** | § | |
| **Defendant and Counter Plaintiff,** | § | |
| **v.** | § | |
| **BALL, KOONS & WATSON, an Alabama partnership; E.E. Ball; Harold A. Koons, III; and Russell J. Watson, individually, said persons being all of the attorney partners in Ball, Koons & Watson partnership, jointly and separately, Plaintiff-Counter-Defendant and additional Counter-Defendants.** | § | |

## MOTION TO SHOW CAUSE

(Filed July 14, 2006)

COMES NOW Ball, Koons & Watson, a partnership, and make this their Motion for the Defendant to appear before this Court and to show cause as to why he should not be placed in the Baldwin County Jail for contempt of Court and as reasons therefore, would show this Honorable Court as follows:

1. The Plaintiff heretofore propounded discovery in this matter, on or about February 14, 2005.

2. The Court has heretofore granted a Motion to propound more than forty interrogatories.

3. On May 24, 2005, the undersigned attorney wrote the Defendant's attorney requesting an answer within ten days to avoid a Motion to Compel. A copy of this letter is attached as Exhibit "A" and incorporated by reference.

4. The responses received in answer to the Plaintiff's interrogatories are non-responsive and designed to obfuscate the discovery process.

WHEREFORE, the above premises considered, the Plaintiff would pray this Honorable Court to enter an Order directing the Defendant to fully and completely answer the interrogatories as propounded on or before a date certain or, thereafter, to appear before the Court to show cause as to why he should not be placed in the Baldwin County Jail for failure to

comply with the previous discovery Orders of the Court.

Respectfully submitted,

/s/ Julian B. Brackin
JULIAN B. BRACKIN
(BRA033)
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this the 13th day of July, 2006, served a copy of the foregoing on the following by placing the same in the U.S. Mail, and via hand delivery, properly addressed and postage paid:

Joseph J. Boswell
Joseph J. Boswell, P.C.
Post Office Box 1112
Mobile, Alabama 36633-1112

/s/ Julian B. Brackin
JULIAN B. BRACKIN
(BRA033)

OF COUNSEL:
BRACKIN, MCGRIFF and JOHNSON, P.C.
P.O. BOX 998
FOLEY, AL 36536
251-943-4040
brackinlaw@gulftel.com

**EXHIBIT A**

LAW OFFICES
BRACKIN, McGRIFF AND JOHNSON, P.C.
150 WEST SECTION AVENUE
POST OFFICE BOX 998
FOLEY, ALABAMA 36536
(251) 943-4040
FACSIMILE: (251) 943-6140

JULIAN B. BRACKIN
KELLY A. McGRIFF
STEPHEN P. JOHNSON*
*ALSO ADMITTED
IN MISSISSIPPI

E-MAIL ADDRESSES:
brackinlaw@gulftel.com
jbbrackinjr@aol.com
kelmcgriff@aol.com
sjohnson4040@yahoo.com

May 24, 2005

Joseph J. Boswell, Esquire
Attorney at Law
Post Office Box 1112
Mobile, AL 36633-1112

Re: Ball, Koons & Watson v. Manci

Dear Mr. Boswell:

We propounded Interrogatories in the above-referenced action on February 14, 2005. As you know, the Judge has now granted our Motion to propound more than 40 Interrogatories. Please provide us answers to these Interrogatories within ten days of the date of this letter to avoid a Motion to Compel.

Very truly yours,

/s/ Julian B. Brackin
JULIAN B. BRACKIN

JBB:fd

## APPENDIX O

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

| | | |
|---|---|---|
| BALL, KOONS AND WATSON, a partnership, | ) | |
| Plaintiff, | ) | |
| vs. | ) | CASE NO: |
| WILLIAM A. MANCI, THE ESTATE OF ARTHUR MANCI, deceased, THE TRUSTEES OF TRUST A & B created under the Last Will and Testament of ARTHUR MANCI, deceased and JEANETTE MANCI TORBERT, ELIZABETH MANCI GARDNER, MARY SUE MANCI and JOSEPH A. MANCI, meaning and intending to name the beneficiaries of the ESTATE OF ARTHUR MANCI, deceased and any Trust created in the Last Will and Testament of ARTHUR MANCI, deceased, JOHN DOE I, JOHN DOE II, JOHN DOE III, meaning an [sic] intending to describe those persons acting in concert with the defendant, including his attorneys and other advisors who have conspired to deprive the plaintiff of legal fees as more particularly described hereinbelow, whose identity is presently unknown but who will be added by amendment when ascertained, | ) | CV-2004-606 |
| Defendants. | ) | |

SECOND NOTICE OF DEPOSITION

(Filed May 18, 2006)

TO: Joseph J. Boswell, Esq.
Post Office Box 1112
Mobile, AL 36633-1112

Mr. Mike Camp
5009 Aldebaran Way West
Mobile, AL 36693-4206

DEPONENT: ALEX MANCI
DATE: JUNE 28, 2006
TIME: 9:00 AM
LOCATION: Brackin, McGriff and Johnson PC
150 West Section Avenue
Foley, Alabama

Please take notice that JULIAN B. BRACKIN, attorney for Plaintiffs, will take the deposition of the deponent named above, at the time, date and location indicated above, upon oral examination before an officer duly authorized to administer oaths and swear witnesses. The oral examination will continue from day to day until completed.

/s/ Julian B. Brackin
JULIAN B. BRACKIN
BRA033
Attorney for Plaintiffs

BRACKIN, McGRIFF AND JOHNSON PC
POST OFFICE BOX 998
FOLEY, ALABAMA 36536
251-943-4040
251-943-6140 (FAX)
jbbrackinjr@aol.com

cc: Ball, Koons & Watson

## APPENDIX P

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

| | |
|---|---|
| IN RE: THE ESTATE OF ARTHUR MANCI, deceased<br>and<br>BALL, KOONS & WATSON, a partnership,<br>Plaintiff,<br>vs.<br>WILLIAM A. MANCI, THE ESTATE OF ARTHUR MANCI, deceased, THE TRUSTEES OF TRUST A & B created under the Last Will and Testament of ARTHUR MANCI, deceased and JEANETTE MANCI TORBERT, ELIZABETH MANCI GARDNER, MARY SUE MANCI and JOSEPH A. MANCI, meaning and intending to name the beneficiaries of the ESTATE OF ARTHUR MANCI, deceased and any Trust created in the Last Will and Testament of ARTHUR MANCI, deceased, JOHN DOE I, JOHN DOE II, JOHN DOE III, meaning an [sic] intending to describe those persons acting in concert with the defendant, including his attorneys and other advisors who have conspired to deprive the plaintiff of legal fees as more | CASE NO: CV-1994-786.01<br><br>CASE NO: CV-2004-606 |

particularly described hereinbelow, whose identity is presently unknown but who will be added by amendment when ascertained, )

Defendants. )

---

NOTICE OF DEPOSITION

(Filed Apr. 11, 2006)

TO: Joseph J. Bowell, Esq.
Post Office Box 1112
Mobile, AL 36633-1112

DEPONENT: ALEX MANCI
DATE: MAY 24, 2006
TIME: 9:00 AM
LOCATION: Brackin, McGriff and Johnson PC
150 West Section Avenue
Foley, Alabama

Please take notice that JULIAN B. BRACKIN, attorney for Plaintiffs, will take the deposition of the deponent named above, at the time, date and location indicated above, upon oral examination before an officer duly authorized to administer oaths and swear witnesses. The oral examination will continue from day to day until completed.

/s/ Julian B. Brackin
JULIAN B. BRACKIN
BRA033
Attorney for Plaintiffs

BRACKIN, McGRIFF AND JOHNSON PC
POST OFFICE BOX 998
FOLEY, ALABAMA 36536
251-943-4040
251-943-6140 (FAX)
jbbrackinjr@aol.com

**APPENDIX Q**

N. PRIDE TOMPKINS, LLC
ATTORNEY AT LAW
180 Carolyn Road
Muscle Shoals, AL 35661

(256) 446-0704
Fax: 446-0607
Cell: 412-5104
E-mail: pridetompkins@comcast.net

April 10, 2006

Julian B. Brackin
Attorney At Law
Box 998
Foley, Al 36536

Re: Ball, Koons & Watson vs. Manci
Baldwin County Circuit Court
Case No: CV-2004-606

Dear Mr. Brackin,

I am in receipt of your letter of April, 2006 about the order I entered on March 28, 2006. I meant in the order the discovery that was outstanding contained within the court's file. Thank you for bringing this to my attention.

With Kindest Regards,

N. Pride Tompkins

cc: Joseph J. Boswell

**APPENDIX R**

LAW OFFICES
BRACKIN, McGRIFF AND JOHNSON, P.C.
150 WEST SECTION AVENUE
POST OFFICE BOX 998
FOLEY, ALABAMA 36536
(251) 943-4040
FACSIMILE: (251) 943-6140

JULIAN B. BRACKIN
KELLY A. McGRIFF
STEPHEN P. JOHNSON*
*ALSO ADMITTED
IN MISSISSIPPI

E-MAIL
ADDRESSES:
breckinlaw@gulftel.com
jbbrackinjr@aol.com
kelmcgriff@aol.com
sjohnson4040@yahoo.com

April 4, 2006

The Honorable N. Pride Thompkins [sic]
180 Carolyn Road
Muscle Shoals, Al 35661

Re: Ball, Koons & Watson v. Manci
Baldwin County Circuit Court
Case No: CV-2004-606

Dear Judge Thompkins [sic]:

I am in receipt of your Order of March 28, 2006 and I would like to get a clarification on paragraph two of your Order. Paragraph Two states as follows:

That all discovery be completed within 30 days of the date of this order.

I think Mr. Boswell and I would both agree that getting all the discovery in this case done before April 28, 2006 would be difficult. All outstanding discovery

within 30 days would be more than reasonable. Please tell us whether you intended that all discovery be completed within 30 days of March 28th, or do you mean only the outstanding discovery which we propounded a long time ago be answered within 30 days.

Your assistance in this regard would be sincerely appreciated.

Very truly yours,

/s/ Julian Brackin
JULIAN B. BRACKIN

JBB:fd

**APPENDIX S**

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

BALL, KOONS & WATSON,
A partnership
Plaintiff

vs.

WILLIAM A. MANCI,
Defendant

CASE NO: CV-2004-606

And

WILLIAM A. MANCI,
Counter-Plaintiff,

vs.

BALL, KOONS, & WATSON
A partnership, et al.
Counter-Defendants

**ORDER**

This cause coming before the Court on the Motion for Summary Judgment in behalf of William A. Manci and the response to said motion in behalf of Ball, Koons, & Watson, a partnership Motion to Strike Motion for Summary Judgment or to continue said motion to allow discovery by the Plaintiff; Motion to Stay Discovery pending ruling on Motion for Summary Judgment and with the attorneys representing the parties being present and with arguments been made on said motions and the court considering the

arguments and the pleading and briefs contained within the file, it THEREFORE, ORDERED, ADJUDGED, and DECREED as follows:

1. The Defendant William A. Manci's Motion for Summary Judgment is DENIED.

2. That all discovery be completed within 30 days of the date of this order.

Done this 28th day of March, 2006

/s/ N. Pride Thompkins
ASSIGNED CIRCUIT JUDGE

cc: Julian B. Brackin
Joseph J. Boswell

## APPENDIX T

**IN THE CIRCUIT COURT**
**OF BALDWIN COUNTY, ALABAMA**

| | | |
|---|---|---|
| Ball, Koons & Watson, a partnership, | * | |
| Plaintiff, | * | Civil Action No: CV-2004-606 |
| vs. | * | |
| William A. Manci, | * | |
| Defendant. | * | |
| William A. Manci, | * | |
| Defendant and Counter Plaintiff, | * | |
| vs. | * | |
| Ball, Koons & Watson, an Alabama partnership; E.E. Ball; Harold A. Koons, III; and Russell J. Watson, individually, said persons being all of the attorney partners in the Ball, Koons & Watson partnership; jointly and separately, | * | |
| Plaintiff-Counter-Defendant and additional Counter-Defendants. | * | |

**DEFENDANT WILLIAM A. MANCI'S**
**MOTION FOR SUMMARY JUDGMENT**

(Filed Jul. 20, 2005)

COMES NOW the Defendant, William A. Manci, pursuant to Rule 56 of the Alabama Rules of Civil

Procedure, and moves the Court to enter a summary judgment in Defendant's favor dismissing the Complaint and each Count thereof on the ground that there is no genuine issue as to any material fact and that the Defendant is entitled to a judgment as a matter of law.

This motion is based upon the pleadings, the affidavit of Defendant William A. Manci with the Exhibits attached thereto, and the pleadings, motions, orders, judgments, and documents contained in the file of the Clerk of this Court in the Case now pending in the Circuit Court of Baldwin County, Alabama, designated and numbered as "In Re: The Estate of Arthur Manci, Deceased," Case Number(s) CV-94-786-94-786.01.

A brief in support of this motion for summary judgment is filed in the Clerk's office at the time of and in conjunction with the filing of this motion for summary judgment, and that brief is adopted and incorporated as part of this motion for summary judgment by reference thereto.

Joseph J. Boswell, P.C.
P.O. Box 1112
Mobile, Alabama 36633-1112
Telephone: (251) 432-9458
Facsimile: (251) 432-9979
E-Mail
address: jboswell@zebra.net

/s/ Joseph J. Boswell
Joseph J. Boswell (BOS005)
Attorney for William A. Manci

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 20th day of July, 2005, I served a copy of the foregoing motion for summary judgment on all counsel of record in this civil action at the stated address, by depositing a copy of the same in the United States mail, properly addressed, and first class postage prepaid:

Julian B. Brackin, Esq.
BRACKIN, McGRIFF
& JOHNSON, P.C.
Post Office Box 998
Foley, Alabama 36536

/s/ Joseph J. Boswell
Joseph J. Boswell (BOS005)

## APPENDIX U

**IN THE CIRCUIT COURT**
**OF BALDWIN COUNTY, ALABAMA**

| | | |
|---|---|---|
| Ball, Koons & Watson, a partnership, | * | |
| Plaintiff, | * | Civil Action No: CV-2004-606 |
| vs. | * | |
| William A. Manci, | * | |
| Defendant. | * | |
| William A. Manci, | * | |
| Defendant and Counter Plaintiff, | * | |
| vs. | * | |
| Ball, Koons & Watson, an Alabama partnership; E.E. Ball; Harold A. Koons, III; and Russell J. Watson, individually, said persons being all of the attorney partners in the Ball, Koons & Watson partnership; jointly and separately, | * | |
| Plaintiff-Counter-Defendant and additional Counter-Defendants. | * | |

### WILLIAM A. MANCI'S MOTION TO STAY DISCOVERY PENDING RULING ON HIS MOTION FOR SUMMARY JUDGMENT

(Filed Jul. 20, 2005)

COMES NOW the defendant and counter-plaintiff, William A. Manci (Manci) and files this motion for this

court to stay discovery in this cause pending a ruling by this Court on his motion for summary judgment. As grounds for this Motion Manci assigns the following:

1. The Plaintiff and Counter-Defendant Ball, Koons & Watson, a partnership (BK&W) has filed an enlarged set of written interrogatories.

2. The motion for summary judgment is meritorious.

3. If this Court grants Manci motion for summary judgment, an answer to most of the interrogatories would unnecessary and a waste of time and money to answer them. (See *Mann v. Mann*, 569 So.2d 415 (Ala. Civ. App. 1990).

WHEREFORE, Manci prays that upon consideration of this Motion the Court will grant the same and Order discovery stayed pending a ruling by this Court on Manci's motion for summary judgment.

Manci prays for all further and different relief which this Court may deem proper, the premises considered.

Joseph J. Boswell, P.C.
P.O. Box 1112
Mobile, Alabama 36633-1112
Telephone: (251) 432-9458
Facsimile: (251) 432-9979
E-Mail
address: jboswell@zebra.net

/s/ Joseph J. Boswell
Joseph J. Boswell (BOS005)
Attorney for William A. Manci

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 20th day of July, 2005, I served a copy of the foregoing brief on all counsel of record in this civil action at the stated address, by depositing a copy of the same in the United States mail, properly addressed, and first class postage prepaid:

Julian B. Brackin, Esq.
BRACKIN, McGRIFF
& JOHNSON, P.C.
Post Office Box 998
Foley, Alabama 36536

/s/ Joseph J. Boswell
Joseph J. Boswell (BOS005)

## APPENDIX V

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

| | | |
|---|---|---|
| BALL, KOONS & WATSON, a partnership, | ) | |
| Plaintiff, | ) | |
| vs. | ) | CASE NO: CV-2004-606 |
| WILLIAM A. MANCI, THE ESTATE OF ARTHUR MANCI, deceased, THE TRUSTEES OF TRUST A & B created under the Last Will and Testament of ARTHUR MANCI, deceased and JEANETTE MANCI TORBERT, ELIZABETH MANCI GARDNER, MARY SUE MANCI and JOSEPH A. MANCI, meaning and intending to name the beneficiaries of the ESTATE OF ARTHUR MANCI, deceased and any Trust created in the Last Will and Testament of ARTHUR MANCI, deceased, JOHN DOE I, JOHN DOE II, JOHN DOE III, meaning an [sic] intending to describe those persons acting in concert with the defendant, including his attorneys and other advisors who have conspired to deprive the | ) | |

plaintiff of legal fees as more particularly described hereinbelow, whose identity is presently unknown but who will be added by amendment when ascertained,

Defendants.

## MOTION TO COMPEL

(Filed Jun. 17, 2005)

Comes now the Plaintiff and moves the Court for an Order compelling the Defendant to answer Interrogatories propounded in this matter and would show unto Your Honor as follows:

1. The Plaintiff propounded Interrogatories on February 14, 2005.

2. The Court has heretofore granted a Motion to Propound more than 40 Interrogatories.

3. On May 24, 2005, the undersigned attorney wrote the Defendants' attorney requesting an answer within ten days to avoid a Motion to Compel. A copy of this letter is attached as Exhibit A and incorporated by reference.

4. As of the date of the filing of this motion, the Interrogatories have not yet been answered.

**WHEREFORE**, Plaintiff prays that Your Honor will enter an Order compelling the Defendant to answer the Plaintiff's Interrogatories heretofore propounded and will grant such other, further and

different relief to which the Plaintiff may be entitled, the premises considered.

/s/ Julian B. Brackin
JULIAN B. BRACKIN – BRA033
BRACKIN, McGRIFF and JOHNSON, P.C.
Attorney for Defendant
Post Office Box 998
Foley, Alabama 36536
(251) 943-4040

CERTIFICATE OF SERVICE

I hereby certify that I have on this the 15 day of June, 2005, served a copy of the foregoing pleading by placing same in the U.S. Mail, properly addressed, and first class postage prepaid to:

Joseph J. Boswell, Esq.
P. O. Box 1112
Mobile, Al 36633-1112

/s/ Julian B. Brackin
JULIAN B. BRACKIN

**EXHIBIT A**

LAW OFFICES
BRACKIN, McGRIFF AND JOHNSON, P.C.
150 WEST SECTION AVENUE
POST OFFICE BOX 998
FOLEY, ALABAMA 36536
(251) 943-4040
FACSIMILE: (251) 943-6140

JULIAN B. BRACKIN
KELLY A. McGRIFF
STEPHEN P. JOHNSON*
*ALSO ADMITTED
IN MISSISSIPPI

E-MAIL ADDRESSES:
breckinlaw@gulftel.com
jbbrackinjr@aol.com
kelmcgriff@aol.com
sjohnson4040@yahoo.com

May 24, 2005

Joseph J. Boswell, Esquire
Attorney at Law
Post Office Box 1112
Mobile, Al 36633-1112

Re: Ball, Koons & Watson v. Manci

Dear Mr. Boswell:

We propounded Interrogatories in the above-referenced action on February 14, 2005. As you know, the Judge has now granted our Motion to propound more than 40 Interrogatories. Please provide us answers to these Interrogatories within ten days of the date of this letter to avoid a Motion to Compel.

Very truly yours,

/s/ Julian B. Brackin
JULIAN B. BRACKIN

JBB:fd

## APPENDIX W

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

| | |
|---|---|
| BALL, KOONS & WATSON, a partnership,<br><br>Plaintiff,<br><br>vs.<br><br>WILLIAM A. MANCI, THE ESTATE OF ARTHUR MANCI, deceased, THE TRUSTEES OF TRUST A & B created under the Last Will and Testament of ARTHUR MANCI, deceased and JEANETTE MANCI TORBERT, ELIZABETH MANCI GARDNER, MARY SUE MANCI and JOSEPH A. MANCI, meaning and intending to name the beneficiaries of the ESTATE OF ARTHUR MANCI, deceased and any Trust created in the Last Will and Testament of ARTHUR MANCI, deceased, JOHN DOE I, JOHN DOE II, JOHN DOE III, meaning an [sic] intending to describe those persons acting in concert with the defendant, including his attorneys and other advisors who have conspired to deprive the plaintiff of legal fees as more particularly described hereinbelow, whose identity is presently unknown but who will be added by amendment when ascertained,<br><br>Defendants. | CASE NO:<br>CV-2004-606 |

**ORDER**

(Filed Jun. 13, 2005)

This matter having come before the Court on the Plaintiff's Motion to Propound more than 40 Interrogatories, the Court finding that the same should be granted, it is therefore,

ORDERED, ADJUDGED and DECREED that the Plaintiff shall be allowed to propound more than 40 Interrogatories in this cause of action.

DONE this the 9th day of June, 2005.

/s/ N. Pride Thompkins
N. PRIDE THOMPKINS,
JUDGE

## APPENDIX X

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

| | | |
|---|---|---|
| BALL, KOONS & WATSON, a partnership, | ) | |
| Plaintiff, | ) | |
| vs. | ) | CASE NO: CV-2004-606 |
| WILLIAM A. MANCI, THE ESTATE OF ARTHUR MANCI, deceased, THE TRUSTEES OF TRUST A & B created under the Last Will and Testament of ARTHUR MANCI, deceased and JEANETTE MANCI TORBERT, ELIZABETH MANCI GARDNER, MARY SUE MANCI and JOSEPH A. MANCI, meaning and intending to name the beneficiaries of the ESTATE OF ARTHUR MANCI, deceased and any Trust created in the Last Will and Testament of ARTHUR MANCI, deceased, JOHN DOE I, JOHN DOE II, JOHN DOE III, meaning an [sic] intending to describe those persons acting in concert with the defendant, including his attorneys and other advisors who have conspired to deprive the | ) | |

plaintiff of legal fees as more particularly described hereinbelow, whose identity is presently unknown but who will be added by amendment when ascertained,

Defendants.

**ANSWER OF E. E. BALL, INDIVIDUALLY, HAROLD A. KOONS, III, INDIVIDUALLY AND RUSSELL J. WATSON, INDIVIDUALLY**

(Filed May 23, 2005)

Comes now E. E. Ball, individually, Harold A. Koons, III, individually and Russell J. Watson, individually, said persons being all of the attorney partners in the partnerships of Ball, Koons & Watson and would make this their answer to the complaint as follows:

Each said individual counterclaim defendant would incorporate the answer of Ball, Koons & Watson, a partnership and would show unto this Honorable Court as follows:

1. Each said individual admits that an attorney-client relationship existed between each said individual and William A. Manci, at all times material to the Complaint.

2. Each said individual counterclaim defendant admits that he was a legal service provider as defined in Section 6-5-573 of the *Code of Alabama*, (1975).

3. Each and every other material allegation of the counterclaim is denied as to each individual attorney and strict proof thereof is demanded.

/s/ Julian B. Brackin
JULIAN B. BRACKIN –
BRA033
Attorney for Plaintiffs

OF COUNSEL:

BRACKIN, McGRIFF AND JOHNSON, P.C.
Post Office box 998
Foley, Alabama 36536
251/943-4040

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this the 18 day of May, 2004 served a copy of the foregoing pleading on Joseph J. Boswell, Esq., P.O. Box 1112, Mobile, Al 36633-1112 by placing same in the U.S. Mail, properly addressed and first class postage prepaid.

/s/ Julian B. Brackin
JULIAN B. BRACKIN

**APPENDIX Y**

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

| | | |
|---|---|---|
| Ball, Koons & Watson, a partnership, | * | |
| Plaintiff, | * | Civil Action No: CV-2004-606 |
| vs. | * | |
| William A. Manci, et al., | * | |
| Defendants. | * | |
| | * | |
| William A. Manci, Defendant and Counter Plaintiff, | * | |
| vs. | * | |
| Ball, Koons & Watson, an Alabama partnership; E.E. Ball; Harold A. Koons, III; and Russell J. Watson, individually, said persons being all of the attorney partners in the Ball, Koons & Watson partnership, jointly and separately, | * | |
| Plaintiff-Counter-Defendant and additional Counter-Defendants. | * | |

## MOTION TO COMPEL PLAINTIFF BALL, KOONS & WATSON (BK&W) TO FILE AMENDED ANSWER TO DEFENDANT WILLIAM A. MANCI'S COUNTERCLAIM FOR DECLARATORY JUDGMENT AND COUNTERCLAIM FOR DAMAGES OR IN THE ALTERNATIVE MOTION FOR COURT TO DETERMINE MERITS OR VALIDITY OF THE RULE 11 ARCivP CERTIFICATION BY COUNSEL FOR BK&W

(Filed Apr. 26, 2005)

COMES NOW the Defendant and Counter-Plaintiff William A. Manci (Manci) and files this motion for the Court to compel the Plaintiff and Counter-Defendant Ball, Koons & Watson, a partnership (BK&W), to file an amended answer to Manci's "Counterclaim for Declaratory Judgment" (DJ Action) and "Counterclaim for Damages" (Damages Action), or in the alternative, motion for the court to determine the merits or validity of the Rule 11 ARCivP certification by counsel for BK&W that he read the answer before filing the same, and that BK&W intended in good faith to deny all of the averments in the Counterclaim except the allegation of the existence of an attorney-client relationship at all material times. As grounds for these combined motions, Manci assigns the following:

1. The DJ Action (pages 5-26) contains 48 separately numbered paragraphs with subparts. The Damages Action (pages 26-29) contains paragraphs 49 through 56 with subparts.

2. Rule 8(b) ARCivP provides in pertinent part as follows:

> ". . . . ; *form of denials*. A party . . . shall admit or deny the averments upon which the adverse party relies. I a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state, and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the party shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all of the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally all the averments or paragraphs as the pleader expressly admits; but when the pleader does so intend to controvert all the averments, the pleader may do so by general denial subject to the obligations set forth in Rule 11."

3. Rule 11 ARCivP provides in pertinent part:

> " . . . The signature of an attorney constitutes a certificate by the attorney that the attorney has read the pleading, . . . ; that to the best of the attorney's knowledge, information, and belief there is good cause to support it; and it is not interposed for delay. . . ."

4. BK&W filed an answer to Manci's Counterclaim as follows:

"1. Comes now the Plaintiff and for answer to the Counterclaim would show unto your Honor that the Plaintiff admits that an attorney-client relationship existed between it and William A. Manci at all times material to this complaint and that the Plaintiff is a legal service provider as defined in Section 6-5-573, Code of Alabama, (1975).

"2. Each and every other material allegation of the Counterclaim is denied and strict proof thereon is demanded."

5. Manci avers that the answer of BK&W to Manci's Counterclaim is not in compliance with the requirements of Rule 8(B) ARCivP.

6. Manci is entitled to know what specific averments in the Counterclaim are admitted, and what specific averments of the Counterclaim are denied.

7. Manci further avers that BK&W's general denial of all of the material averments of the Counterclaim other that admitting the existence of an attorney-client relationship at all material times is not a good faith general denial of all of the material averments of the counterclaim.

WHEREFORE, Manci prays that the Court will Order the following:

1. That the Court will Order BK&W to file an amended answer to Manci's Counterclaim which is in compliance with the requirements of Rule 8(b) AR-CivP; or in the alternative;

2. That the Court will set a hearing on these combined motions and take evidence on the merits or validity of the Rule 11 ARCivP certification by counsel for BK&W that he read the answer before filing the same, and that BK&W intended in good faith to deny all of the averments in the Counterclaim except the averment of the existence of an attorney-client relationship at all material times.

Joseph J. Boswell, P.C.
P.O. Box 1112
Mobile, Alabama 36633-1112
Telephone: (251) 432-9458
Facsimile: (251) 432-9979
E-mail: jboswell@zebra.net

/s/ Joseph J. Boswell
Joseph J. Boswell (BOS005)
Attorney for William A.
Manci Defendant and
Counter-Plaintiff

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 19th day of April, 2005, I served a copy of the foregoing combined motions on the below named counsel of record for the Plaintiff and Counter-Defendant at the stated address by depositing a copy of the same in the

United States mail, properly addressed, and first class postage prepaid:

Julian B. Brackin, Esq.
BRACKIN, McGRIFF AND
JOHNSON, P.C.
Post Office Box 998
Foley, Alabama 36536

/s/ Joseph J. Boswell
Joseph J. Boswell (BOS005)

## APPENDIX Z

## IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

| | | |
|---|---|---|
| BALL, KOONS & WATSON, a partnership, | * | |
| Plaintiff, | * | Civil Action Number |
| vs. | * | CV-2004-606 |
| WILLIAM A. MANCI, ET AL, | * | |
| Defendants. | * | |

## OFFER OF JUDGMENT

(Filed Apr. 19, 2005)

The defendant William A. Manci offers to allow judgment to be taken against him by the plaintiff for Fifty Thousand and No/100 ($50,000.00) Dollars with costs now accrued.

Joseph J. Boswell, P.C.
P.O. Box 1112
Mobile, Alabama 36633-1112
Telephone: (251) 432-9458
Facsimile: (251) 432-9979
E-mail: jboswell@zebra.net

/s/ Joseph J. Boswell
Joseph J. Boswell (BOS005)
Attorney for Defendant
William A. Manci

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 18th day of April, 2005, I served a copy of the foregoing Offer of Judgment on the below named counsel of record for the plaintiff at the stated address by depositing a copy of the same in the United States mail, properly addressed, and first class postage prepaid:

Julian B. Brackin, Esq.
BRACKIN, McGRIFF AND
JOHNSON, P.C.
Post Office Box 998
Foley, Alabama 36536

/s/ Joseph J. Boswell
Joseph J. Boswell (BOS005)

**APPENDIX AA**

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

BALL, KOONS & WATSON
Plaintiff

vs. CASE NO: CV-2004-606

WILLIAM A MANCI, ET AL.,
Defendant

**ORDER OF DISMISSAL**

(Filed Mar. 7, 2005)

This cause coming on for a hearing on February 22, 2005 on the Motion to Dismiss filed by the Defendants, The estate of Arthur Manci, deceased, The Trustees of Trust A & B created under the Last Will 8t Testament of Arthur Manci, Deceased, Jeanette Manci Torbert, Elizabeth Manci Gardner, and Mary-Sue Manci and the Court having considered the arguments and authorities submitted by the parties is of the opinion that said motion is due to be GRANTED. It is, therefore, ORDERED, ADJUDGED and DECREED as follows, to-wit:

1. That all claims stated in the Complaint seeking relief of the Defendants named in the Complaint as The Estate of Arthur Manci, Deceased, the Trustees of Trust A & B created under the Last Will & Testament of Arthur Manci, Deceased, Jeanette Manci, Torbert, Elizabeth Manci Gardner, and Mary Sue Manci, are due to be, and are hereby, DISMISSED, with prejudice, costs taxed to the Plaintiff.

2. That the Court does hereby direct the entry of a final judgment as to the claims dismissed hereby, and does hereby expressly determine that there is no just reason for delay in the entry of said final judgment and does hereby expressly direct the entry of said final judgment, all pursuant to Rule 54(b) of the Alabama Rules of Civil Procedure.

Done this the 2nd day of March, 2005.

/s/ N. Pride Thompkins
Circuit Judge

## APPENDIX BB

## IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

| | | |
|---|---|---|
| BALL, KOONS & WATSON, a partnership, | ) | |
| Plaintiff, | ) | |
| vs. | ) | CASE NO: CV-2004-606 |
| WILLIAM A. MANCI, THE ESTATE OF ARTHUR MANCI, deceased, THE TRUSTEES OF TRUST A & B created under the Last Will and Testament of ARTHUR MANCI, deceased and JEANETTE MANCI TORBERT, ELIZABETH MANCI GARDNER, MARY SUE MANCI and JOSEPH A. MANCI, meaning and intending to name the beneficiaries of the ESTATE OF ARTHUR MANCI, deceased and any Trust created in the Last Will and Testament of ARTHUR MANCI, deceased, JOHN DOE I, JOHN DOE II, JOHN DOE III, meaning an [sic] intending to describe those persons acting in concert with the defendant, including his attorneys and other advisors who have conspired to deprive the plaintiff of legal fees as more particularly described hereinbelow, whose identity is presently unknown but who will be added by amendment when ascertained, | ) | |
| Defendants. | ) | |

## MOTION TO PROPOUND MORE THAN FORTY (40) INTERROGATORIES

(Filed Feb. 16, 2005)

Comes Now, BALL, KOONS & WATSON and would make this their Motion to Propound more than Forty (40) Interrogatories and would show unto this Honorable Court as follows:

1. The Defendant/Counterclaim Plaintiff's Counterclaim for Declaratory Judgment and other Counterclaims consists of three (3) counts, fifty-six (56) paragraphs and is thirty (30) pages long.

2. As such, it will be impossible to perform any meaningful discovery with only forty (40) Interrogatories.

3. It is necessary for the Plaintiffs to initially propound at least fifty-five (55) interrogatories. A copy of said interrogatories are attached hereto as an Exhibit.

WHEREFORE, the above premises considered, the Plaintiff would pray this Honorable Court to enter an Order granting them to propound more than forty (40) interrogatories to the Defendant in this matter and would grant them any other, further and different relief to which they may be entitled, the premises considered.

Respectfully submitted,

/s/ Julian B. Brackin
JULIAN B. BRACKIN
BRACKIN, McGRIFF and
JOHNSON, P.C.
Attorney for Defendant
Post Office Box 998
Foley, Alabama 36536
(251) 943-4040

CERTIFICATE OF SERVICE

I hereby certify that I have on this the 14 day of FEB, 2005 served a copy of the foregoing pleading by placing same in the U.S. Mail, properly addressed and first class postage prepaid to:

Joseph J. Boswell, Esq.
P. O. Box 1112
Mobile, Al 36633-1112

/s/ Julian B. Brackin
JULIAN B. BRACKIN

**EXHIBIT**

**IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA**

BALL, KOONS & WATSON, a partnership,

Plaintiff,

vs.

WILLIAM A. MANCI, THE ESTATE OF ARTHUR MANCI, deceased, THE TRUSTEES OF TRUST A & B created under the Last Will and Testament of ARTHUR MANCI, deceased and JEANETTE MANCI TORBERT, ELIZABETH MANCI GARDNER, MARY SUE MANCI and JOSEPH A. MANCI, meaning and intending to name the beneficiaries of the ESTATE OF ARTHUR MANCI, deceased and any Trust created in the Last Will and Testament of ARTHUR MANCI, deceased, JOHN DOE I, JOHN DOE II, JOHN DOE III, meaning an [sic] intending to describe those persons acting in concert with the defendant, including his attorneys and other advisors who have conspired to deprive the plaintiff of legal fees as more particularly described hereinbelow, whose identity is presently unknown but who will be added by amendment when ascertained,

Defendants.

CASE NO: CV 2004-606

## PLAINTIFF'S FIRST CONSOLIDATED DISCOVERY REQUEST TO DEFENDANT WILLIAM A. MANCI

(Filed Feb. 16, 2005)

COMES NOW the Plaintiff and propounds the request for admissions, interrogatories, and requests for production pursuant to Rules 33, 34 and 36 of the Alabama Rules of Civil Procedure. Each discovery request is to be responded to by you within thirty (30) days of date of service as required by the rules of civil procedure. Production of the requested materials is to be made at the office Kelly A. McGriff, Brackin, McGriff and Johnson, P.C., Post Office Box 998, Foley, Alabama 36536.

### INSTRUCTIONS FOR USE

All information is to be divulged which is in the possession of you, your attorney, investigators, agents, employees, or other representatives of you and your attorney.

If you lack the information necessary to answer any of the Interrogatories, describe the specific efforts made by you or anyone on your behalf to ascertain the information and state as definitively as possible when you anticipate obtaining the information and supplementing your responses.

## DEFINITIONS

Unless otherwise indicated, the following definitions shall be applicable to these interrogatories and requests for production:

"You" and "your" shall mean the person on whom this request is served and each of his, her or its attorneys, employees, agents, representatives, and all other persons acting on his, her or its behalf.

"Identify a Person" when employed with regard to a natural person, refers to the name of such person, the present or last known address of such person, the name and address of such person's employer and the position of employment held by such person. When the clause "identify person" is employed with reference to a person not an individual, such term shall require the name and principal office of such person, the date and place of incorporation, if applicable, and such other information as necessary to identify, locate and/or communicate with such person.

"Document" shall mean any writings, letters, telegrams, memoranda, recorded recollections of conferences or telephone conversations, reports, studies, lists, any written compilation of data, paper, books, records, contracts, drawings, photographs, mechanical or electronic recordings in any for, and all other identifiable objects upon which any inscription, handwriting, typing, printing, drawing, representation by any means, whether magnetic, electrical, photostatic, or any other form of communication is recorded, reproduced, perpetuated, maintained or

preserved. These terms similarly embrace the reproduction or copies of the foregoing.

"Identify a Document" shall refer to the requirement that the identity of the person preparing the document be disclosed, the identity of all persons signing, issuing and/or attesting to such document be disclosed, the identity of addresses or distributees be disclosed, the nature, contents and/or substance of the document be disclosed with sufficient particularity so as to enable identification, the date which the document bears must be disclosed and, in the event the document bears no date, a disclosure of that fact, together with the date upon which such document was prepared, a disclosure of the physical location of the document, together with the names and addresses of the custodian or custodians of the document.

"Communication" shall refer to the transmission, transfer, or receipt of information in any form, by any means, in any manner at any time or place, under any circumstances whatsoever.

"Address" shall mean the street number, street, city, and state of subject person, business, or other entity.

"Income" means your actual "gross income" if employed to full capacity, or ability to earn income, if unemployed or under-employed.

"Gross Income" includes income from any source, and includes, but is not limited to, income from

salaries, wages, commissions, consulting fees, bonuses, dividends, severance pay, pension income, interest, trust income, annuities, capital gains, social security benefits, workmen's compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, prizes, and pre-existing periodic alimony.

"Gross Income" does not include child support received for other children or benefits received from means-tested public assistance programs, including but not limited to aid to families with dependent children, supplemental security income, food stamps, and general assistance.

"Income" or "Gross Income" also includes "employment income," "self employment income," "other employment related income," and "other non-employment related income," each of which terms are further defined hereinafter.

"Employment Income" shall include, but not be limited to, salary, wages, bonuses, commissions, severance pay, workmen's compensation, pension income, unemployment insurance, disability insurance, and social security.

"Self-Employment Income" shall include, but not be limited to, income from self-employment, rent, royalties, proprietorship of a business, and joint ownership of a partnership or a closely held corporation. "Gross Income" means gross receipts minus ordinary and necessary expenses required to produce such income. Further, "Gross Income" derived from

"Self-Employment Income" means gross receipts minus "ordinary and necessary" expenses required to produce such income as allowed by the Internal Revenue Service. However, "ordinary and necessary expenses" *does not include* amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses or investment tax credits.

"Other Employment-Related Income" shall include, but not be limited to, the average monthly value of any expense reimbursements or in-kind payments received in the course of employment that are significant and reduce personal living expenses such as a furnished automobile, clothing allowance, and housing allowance.

"Other Non-Employment Related Income" shall include, but not be limited to, dividends, interest, annuities, capital gains, gifts, prizes, and pre-existing periodic alimony.

## I. INTERROGATORIES

1. Please state the full name, physical and mailing address, day-time telephone number, Driver's License Number, Social Security Number, and Date of Birth of any person who assisted in answering these interrogatories.

2. State the name, physical address, mailing address, and relationship to the Defendants of any person who has investigated the incidents made the basis of the complaint and

indicate the nature and scope of each such investigation performed by such person.

3. Has a written or recorded statement been taken from any person who has knowledge of relevant facts concerning the incidents made the basis of his lawsuit?

4. If the answer to the preceding interrogatory is in the affirmative, for each such statement please state specifically:

   A. The kind, that is, whether it is written, recorded or otherwise.

   B. The name of the person from whom the statement was taken.

   C. The name and address of the person who took the statement.

   D. The name and address of the person(s) present when the statement was taken.

   E. The date of the statement and the place it was taken.

5. Give the name and address of anyone who was a witness to *or* who has personal knowledge of the events and the factual allegations contained in the complaint.

6. Please state the name, address and telephone number of each person:

   A. Who you will call to testify at a trial of this cause in support of the allegations in your complaint.

B. Who you know, or believe to be, in possession or control of any documents pertaining to the cause, facts, or circumstances of the incidents described in your complaint.

C. A detailed statement as to what each person will testify regarding.

7. State the name, address and telephone number of each person who knows or you believe has personal knowledge of the events described in your complaint.

8. Identify each person whom you expect to call as an expert witness at trial.

A. State the subject matter in which the expert witness will testify to at trial.

B. State the substance, facts and opinions to which the expert is expected to testify.

C. State a summary of the grounds each opinion.

9. State the name, address and day-time telephone number of any expert you have retained or specifically employed in anticipation of litigation who is not expected to be called as a witness at this trial.

10. Provide a summary of what expert witness will say.

11. Please produce all statements of witnesses you expect to call at a trial of this cause.

12. Please produce all documents, records, correspondence, notes, and memorandum in which in any manner relate, refer, or pertain to the allegation contained in the complaint.

13. Please produce all photographs, video tapes, films or documents made by you or on behalf of you or otherwise known to have been made as a result of the incidents described in the complaint of any person or persons, place or places and thing or things.

14. If you claim or will claim that the Plaintiffs failed to perform all of the Plaintiff's obligations and conditions precedent to their right to recover pursuant to the contract entered on November 10, 1998, state each and every fact, in detail, which supports your contention, in detail, and include all documentary evidence which supports said contention.

15. Produce copies of all invoices, bills, receipts and other documents presented by the Defendants for payment as sought by the Plaintiffs.

16. Produce all documents showing any payments to the Plaintiffs.

17. State in detail all facts you contend supports [sic] your claim or claims made by you in your counter-claim.

18. State in detail, each and every fact which supports your claim that at the time you signed the contingency contract on November 10, 1998, you were the prima facie fee simple owner of said real property referred to

by you in your counter-claim as, "The Property," and enclose herewith all documentation which supports your contention.

19. State in detail, each and every fact which supports your claim that Ball, Koons & Watson's (hereinafter referred to as "The Firm") successful defense of you in The Estate Action against the Co-Executrixes' Amended Complaint claim of non-delivery of the 78 Deed did not result in a recovery of The Property for you from the Arthur Manci Estate, and enclose herewith all documentation which supports your conviction.

20. State in detail, each and every fact which supports your claim that The Firm's defense or you against the claim of non-delivery of the 78 Deed did result in the trial court's order and judgment which prevented the Arthur Manci Estate from recovering The Property from you, and enclose herewith all documentation which supports your contention.

21. State in detail, each and every fact which supports your claim that The Firm is only entitled to be compensated on the basis of *quantum meruit* for the reasonable value of the firm's legal service rendered in defending you against the claim of non-delivery of the 78 Deed, and enclose herewith all documentation which supports your contention.

22. State in detail, each and every fact which supports your claim that your refusal to pay

The Firm the claimed $333,000.00 contingent fee was not a breach of the Contract, and enclose herewith all documentation which supports your contention.

23. State in detail, each and every fact which supports your claim that the verified statement of lien as filed by The Firm has created a cloud on your title to The Property that is *wrongful*, and enclose herewith all documentation which supports your contention.

24. State in detail, each and every fact which supports your claim that your original contingent undivided one-fifth ownership interest in the Trust Estate properties owned by the Co-Trustees of the Trusts became a vested undivided ownership interest in the remaining corpus of the Trust Estate of Trust A and Trust B upon the death of your mother on January 30th, 2004, and enclose herewith all documentation with supports your contention.

25. State in detail, each and every fact which supports your claim that your now vested undivided ownership interest in the remaining corpus of the Trust Estate of Trust A and Trust B upon the death of your mother is the result of the express provisions of the Will of Arthur Manci, and enclose herewith all documentation which supports your contention.

26. State in detail, each and every fact which supports your claim that The Firm's representation of you in The Estate Action did not

result in The Firm's recovery of your undivided ownership interest in those properties, i.e., the remaining corpus of the Trust Estate of Trust A and Trust B upon the death of your mother from the Arthur Manci Estate, and enclose herewith all documentation which supports your contention.

27. State in detail, each and every fact which supports your claim that The Firm does not have a right, pursuant to the terms of the contract, to be paid a contingent fee in an amount equal to one-third of the fair market value of your undivided ownership interest of the title to those properties [i.e., the remaining corpus of the Trust Estate of Trust A and Trust B upon the death of your mother from the Arthur Manci Estate], and enclose herewith all documentation which supports you contention.

28. State in detail, each and every fact which supports your claim that your refusal to pay The Firm their claimed contingent fee is not a breach of contract, and enclose herewith all documentation which supports your contention.

29. State in detail, each and every fact which supports your claim that the verified statement of lien as filed by The Firm has wrongfully created a cloud on your undivided ownership interest in the title to the property as referred to herein, and enclose herewith all documentation which supports your contention.

30. State in detail, each and every fact which supports your claim that you do not owe The Firm the amount as sought by them for expenses incurred by The Firm, and enclose herewith all documentation which supports your contention.

31. State in detail, each and every fact which supports your claim that you only owe The Firm for expense incurred in connection with The Firm's preparation of your defense against the Co-Executrixes' claim of non-delivery of the 78 Deed, and enclose herewith all documentation which supports your contention.

32. State in detail, each and every fact which supports your claim that The Firm, or any member thereof, failed to use such reasonable care, skill, and diligence as other similarly situated attorney legal service providers in the same general line of practice in the same general locality have and exercise in a like case, during the course of providing legal services to you in the Estate Action, and enclose herewith all documentation which supports your contention.

33. State in detail, each and every fact which supports your claim that The Firm, or any member thereof, violated any fiduciary responsibility or breached any duty to exercise the "highest degree of good faith, fairness, and honesty," as you claim in your counterclaim, and enclose herewith all documentation which supports your contention.

34. State in detail, each and every fact which supports your claim that The Firm had no right to make a demand for payment of a contingent fee in the amount of $333,000.00, and enclose herewith all documentation which supports your contention.

35. State in detail, each and every fact which supports your claim that you had and have no obligation to pay the amount sought by The Firm under the terms of the Contract, enclose herewith all documentation which supports your contention, and cite the specific Contract language which supports your contention.

36. State in detail, each and every fact which supports your claim that any demand for payment by The Firm as cited in Paragraph 55 (A) of your counter-claim was a material breach of the Contract by The Firm, and enclose herewith all documentation which supports your contention.

37. State in detail, each and every fact which supports your claim that The Firm's filing of a verified statement of lien on March 16, 2004, The Property in Probate Court to secure payment by you is a false publication as you have claimed in your counter-claim, and enclose herewith all documentation which supports you contention.

38. State in detail, each and every fact which supports your claim that The Firm's filing of a verified statement of lien on March 16, 2004 on The Property in Probate Court to

secure payment by you is a malicious publication, and enclose herewith all documentation which supports your contention.

39. State in detail, each and every fact which supports your claim that The Firm had not right to demand payment of a contingency fee as you claim in Paragraph 55 (C) of your counter-claim, and enclose herewith all documentation which supports your contention.

40. State in detail, each and every fact which supports your claim that you had no obligation to perform under the terms of the Contract, as you claim in Paragraph 55 (c) of your counter-claim, and enclose herewith all documentation which supports your contention.

41. State in detail, each and every fact which supports your claim that The Firm's demand for payment was a material breach of the Contract by The Firm or any of it's members, and enclose herewith all documentation which supports your contention.

42. State in detail, each and every fact which supports your claim that The Firm's filing a verified statement of lien on May 12, 2004 on your undivided one-fifth ownership in the titles to the properties previously owned by the Co-Trustees of the Trusts to secure your payment of a contingent fee to The Firm is a false publication in disparagement of your ownership interest in the titles to those

properties, and enclose herewith all documentation which supports your contention.

43. State in detail, each and every fact which supports your claim that The Firm's filing a verified statement of lien on May 12, 2004 on your undivided one-fifth ownership in the titles to the properties previously owned by the Co-Trustees of the Trust to secure your payment of a contingent fee to The Firm is malicious publication in disparagement of your ownership interest in the titles to those properties, and enclose herewith all documentation which supports your contention.

44. State in detail, each and every fact which supports your claim that The Firm's filing of verified statements of liens falsely and maliciously impugn your "creditworthiness in the business world," and enclose herewith all documentation which supports your contention.

45. List each and every way, in detail, your "creditworthiness in the business world" has been impugned by the filing of verified statements of liens by The Firm, and enclose herewith all documentation which supports your contention.

46. State in detail, each and every fact which supports your claim that The Firm, or any member thereof, willfully misrepresented to you any material fact, laying our specifically said misrepresentation, designate specifically how each such misrepresentation was made to induce you to pay The Firm a

contingency fee, and enclose herewith documentation which supports your contention.

47. State in detail, each and every fact which supports your claim that The Firm, or any member thereof, grossly and maliciously violated the standard of care and breached fiduciary duties owed by The Firm, or any member thereof, to you, laying out specifically how:

    a. the "standard of care" was "grossly and maliciously violated," and,

    b. any fiduciary duty was breached.

48. State in detail, each and every fact which supports your claim that you nave been caused, and continue to suffer from "severe mental anguish and emotional distress," as you claim in Paragraph 55 (F) of your counter-claim, including with your answer the following:

    a. the name, address, and day-time telephone number of any physician, psychiatrist, psychologist, priest, counselor, or any other person for whom you have sought treatment for your, "severe mental anguish and emotional distress," and,

    b. copies of any bills or claim statements for any treatments or drugs, incurred due to any "severe mental anguish and emotional distress," as noted above.

49. State in detail, each and every fact which supports your claim that your titles to the properties upon which the verified statements of liens have been filed have been rendered unmarketable, including with your answer all documentation showing your attempts to market the properties in question since the filing of the statements of liens, and all other documentation which supports your contention.

50. State in detail, each and every fact with supports your claim that you have needed or desired to use the titles to the properties in question as security for personal or business loans since the date of the filings of the verified statements of liens, including with your answer a detailed statement as to each instance when you have needed or desired to use the titles to the properties in question, laying out for each all details regarding your attempts to obtain either a personal loan or business loan, the outcome thereof, and all documentation which supports your contention.

51. State in detail, each and every fact which supports your claim that your business reputation has been damaged due to any alleged action by The Firm or any member thereof, stating in specific detail exactly what facts lead you to make said assertion, including with your answer the name, address, and daytime telephone number of each and every witness you will call to testify in support of

this claim, and all documentation which supports your contention.

52. State in detail, each and every fact which supports your claim that you have been caused to incur substantial attorney's fees and expenses in obtaining the removal of the liens from your titles to your said properties, including with your answer in specific detail each and every reason for your belief that The Firm, or any member thereof is liable to you for any attorney's fees.

53. State the amount of money you have paid to your present attorney, Hon. Joseph J. Boswell, any arrangement to pay future monies, and a copy of any and all documentation reflecting your agreement to pay fees to Boswell.

54. State in detail, each and every fact which supports your claim that you have been caused to suffer, still so suffers, and will in the future be caused to suffer "severe and extreme mental anguish and emotional distress," including with your answer a detailed statement which lays out your theory as to why The Firm, or any member thereof, is liable to you for the same, and provide a copy of any and all documentation which documents and/or memorializes your "severe and extreme mental anguish and emotional distress."

55. State in detail, each and every fact which supports your claim for punitive damages,

and enclose herewith all documentation which supports your contention.

Respectfully submitted,

/s/ Julian B. Brackin
JULIAN B. BRACKIN – BRA033
BRACKIN, McGRIFF and JOHNSON, P.C.
Attorney for Defendant
Post Office Box 998
Foley, Alabama 36536
(251) 943-4040

CERTIFICATE OF SERVICE

I hereby certify that I have on this the 14 day of February, 2005 served a copy of the foregoing pleading by placing same in the U.S. Mail, properly addressed and first class postage prepaid to:

Joseph J. Boswell, Esq.
P. O. Box 1112
Mobile, Al 36633-1112

/s/ Julian B. Brackin
JULIAN B. BRACKIN

**IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA**

| | | |
|---|---|---|
| BALL, KOONS & WATSON, a partnership, | ) | |
| Plaintiff, | ) | |
| vs. | ) | CASE NO: CV-2004-606 |
| WILLIAM A. MANCI, THE ESTATE OF ARTHUR MANCI, deceased, THE TRUSTEES OF TRUST A & B created under the Last Will and Testament of ARTHUR MANCI, deceased and JEANETTE MANCI TORBERT, ELIZABETH MANCI GARDNER, MARY SUE MANCI and JOSEPH A. MANCI, meaning and intending to name the beneficiaries of the ESTATE OF ARTHUR MANCI, deceased and any Trust created in the Last Will and Testament of ARTHUR MANCI, deceased, JOHN DOE I, JOHN DOE II, JOHN DOE III, meaning an [sic] intending to describe those persons acting in concert with the defendant, including his attorneys and other advisors who have conspired to deprive the plaintiff of legal fees as more particularly described hereinbelow, whose identity is presently unknown but who will be added by amendment when ascertained, | ) | |
| Defendants. | ) | |

**ORDER**

The Motion to Propound more than forty (40) Interrogatories coming for consideration, it being the opinion of the Court, the same is well taken, it is hereby ORDERED, ADJUDGED and DECREED that the Plaintiff's Motion is due to be and is hereby GRANTED. The Plaintiffs are allowed to initially propound _____ Interrogatories in this matter.

Done this the _____ day of _____, 2005.

/s/ _____
BALDWIN COUNTY JUDGE

## APPENDIX CC

## IN THE SUPREME COURT OF ALABAMA
## ORDER

(Filed Nov. 3, 2004)

**TO THE HONORABLE N. PRIDE TOMPKINS,
RETIRED CIRCUIT JUDGE,
COLBERT COUNTY, ALABAMA**

**IT APPEARING** that the judges of the 28th Judicial Circuit have recused themselves in the following-styled case pending on the docket of the Circuit Court of Baldwin County:

**RE: In the Circuit Court of
Baldwin County, Alabama**

**Ball, Koons, & Watson**

**v.**

**William A. Manci, et al.**

**Case No. CV-2004-606**

**and it appearing** that the public good requires that a judge from outside the circuit be assigned to hear said case;

**THEREFORE**, pursuant to Section 6.10 of Constitutional Amendment No. 328, Constitution of Alabama 1901, as amended, it is directed that the above-styled case be assigned to you, and you are directed to preside as circuit judge in all matters concerning said case in said court, with full authority of a regular circuit judge of Baldwin County, and your authority in the case is continuous until final disposition thereof. Travel expenses as provided for

by §§ 36-7-20 and 36-7-22, *Code of Alabama* 1975, will be reimbursed to Judge Tompkins during assignment duties in this case.

**IT IS FURTHER DIRECTED** that this order be spread upon the minutes of the above-referenced court.

**ORDERED** at Chambers this the 12th day of October, 2004.

/s/ Drayton Nabers Jr.
**Drayton Nabers, Jr.**
**Chief Justice**
**Alabama Supreme Court**

c: Honorable Robert G. Esdale, Clerk of the Supreme Court
Honorable James H. Reid, Presiding Circuit Judge
Honorable Jody Wise Campbell, Circuit Clerk
The clerk shall immediately send a copy of the file to the appointed judge, and notify the attorneys of record of this appointment.
AOC File

**APPENDIX DD**

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

| | | |
|---|---|---|
| BALL, KOONS & WATSON, a partnership, Plaintiff, | ) | |
| vs. | ) | CASE NO: CV-2004-606 |
| WILLIAM A. MANCI, THE ESTATE OF ARTHUR MANCI, deceased, THE TRUSTEES OF TRUST A & B created under the Last Will and Testament of ARTHUR MANCI, deceased and JEANETTE MANCI TORBERT, ELIZABETH MANCI GARDNER, MARY SUE MANCI and JOSEPH A. MANCI, meaning and intending to name the beneficiaries of the ESTATE OF ARTHUR MANCI, deceased and any Trust created in the Last Will and Testament of ARTHUR MANCI, deceased, JOHN DOE I, JOHN DOE II, JOHN DOE III, meaning an [sic] intending to describe those persons acting in concert with the defendant, including his attorneys and other advisors who have conspired to deprive the plaintiff of legal fees as more particularly described hereinbelow, whose identity is presently unknown but who will be added by amendment when ascertained, Defendants. | ) | |

## ANSWER TO COUNTERCLAIM

(Filed Jul. 20, 2004)

1. Comes now the Plaintiff and for answer to the Counterclaim would show unto your Honor that the Plaintiff admits that an attorney-client relationship existed between it and William A. Manci at all times material to this complaint and that the Plaintiff is a legal service provider as defined in Section 6-5-573, Code of Alabama (1975).

2. Each and every other material allegation of the Counterclaim is denied and strict proof thereon is demanded.

/s/ Julian B. Brackin
JULIAN B. BRACKIN –
BRA033
Attorney for Plaintiffs

OF COUNSEL:

BRACKIN, McGRIFF AND JOHNSON, P.C.
Post Office Box 998
Foley, Alabama 36536
251/943-4040

CERTIFICATE OF SERVICE

I hereby certify that I have on this the 20 day of July, 2004 served a copy of the foregoing pleading on Joseph J. Boswell, Esq., P. O. Box 1112, Mobile,

Al 36633-1112 by placing same in the U.S. Mail, properly addressed and first class postage prepaid.

/s/ Julian B. Brackin
JULIAN B. BRACKIN

**APPENDIX EE**

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

| | | |
|---|---|---|
| BALL, KOONS & WATSON, a partnership, Plaintiff, | ) | |
| vs. | ) | CASE NO: CV-2004-606 |
| WILLIAM A. MANCI, THE ESTATE OF ARTHUR MANCI, deceased, THE TRUSTEES OF TRUST A & B created under the Last Will and Testament of ARTHUR MANCI, deceased and JEANETTE MANCI TORBERT, ELIZABETH MANCI GARDNER, MARY SUE MANCI and JOSEPH A. MANCI, meaning and intending to name the beneficiaries of the ESTATE OF ARTHUR MANCI, deceased and any Trust created in the Last Will and Testament of ARTHUR MANCI, deceased, JOHN DOE I, JOHN DOE II, JOHN DOE III, meaning an intending to describe those persons acting in concert with the defendant, including his attorneys and other advisors who have conspired to deprive the plaintiff of legal fees as more particularly described hereinbelow, whose identity is presently unknown but who will be added by amendment when ascertained, Defendants. | ) | |

## COMPLAINT

(Filed May 18, 2004)

### COUNT ONE

1. On or about May 28, 1998, Defendant William A. Manci entered into a contract for legal services wherein he employed Ball & Koons, Attorneys at Law, to perform certain legal services on the Defendant's behalf.

2. On November 10, 1998, an additional employment contract was entered into between the Defendant William A. Manci and Ball & Koons, Attorneys at Law, which superceded the contract of May 28, 1998.

3. Ball & Koons, Attorneys at Law, is now known as Ball, Koons & Watson, a partnership.

4. The Plaintiff has substantially performed all the terms required of it under the terms of said Employment Agreement and a dispute has arisen concerning the amount the Defendant William A. Manci owes the Plaintiff for legal services rendered.

5. A justiciable controversy exists between the parties.

WHEREFORE, Plaintiff prays that Your Honor will set this matter down for hearing at the earliest time convenient to the Court and upon a trial of this matter will enter an Order or Decree declaring the respective rights and responsibilities of the parties under the terms of the Employment Agreements

referred to hereinabove and will Order Defendant William A. Manci to pay such sums to Ball, Koons & Watson for services rendered to William A. Manci, as the Court may deem appropriate, the premises considered.

## COUNT TWO

6. The Plaintiff realleges all of the matters set forth in Count One of the Complaint.

7. The Plaintiff has rendered valuable legal services to the Defendant and the Defendant has breached the Employment Agreement by failing to pay fees as the same have become due.

WHEREFORE, Plaintiff demands judgment against the Defendant in a sum in excess of the jurisdictional limits of this Court plus interest and costs.

## COUNT THREE

8. The Plaintiff realleges all of the matters set forth in Count One and Count Two of the Complaint.

9. By virtue of the Fee Agreement entered into between the parties, the Plaintiff is the owner of an undivided one-third interest in the following described real property located in Baldwin County, Alabama:

> Lots 22, 23, 24, 25, 26 and 27 in Highland Farms, according to official map or plat

thereof which is recorded in Miscellaneous Book 1 at Page 290, Baldwin County, Alabama Probate Records, which is otherwise described as the West half of the Southeast quarter of the Southwest quarter and the Southwest quarter of the Southwest quarter of Section 26, Township 5 South, Range 2 East, containing 60 acres more or less.

10. Defendant William A. Manci is the owner of an undivided two-thirds interest in the hereinabove described property.

11. The Plaintiff is presently unable to determine whether said property can be divided in kind.

12. If the property referred to hereinabove can be divided in kind, the Plaintiff prays for an equitable division of said real property.

13. If the hereinabove described real property cannot be divided in kind, the Plaintiff prays that the same be sold and all proceeds derived therefrom, after expenses of sale and expenses of this cause of action be divided one-third to the Plaintiff and two-thirds to the Defendant.

14. The Plaintiff owns an undivided one-third interest in an undivided one-fifth interest in the following described parcels of property located in Baldwin County, Alabama:

PARCEL ONE: Lot 34, Block 3, Yuilles Belrose Wharf Subdivision as recorded in Miscellaneous Book 1, Page 169 in the Office of

the Judge of Probate of Baldwin County, Alabama.

PARCEL TWO: Beginning at the intersection of the North right-of-way of Belrose Avenue and the East right-of-way of Main Street, run thence North 61 feet, thence West 115 feet, thence South 61 feet, thence East 115 feet to the point of beginning, located in Section 41, Township 5 South, Range 2 East, also known as the East 115 feet of Lot 34, Block 4, Yuilles Belrose Wharf Subdivision as recorded in Miscellaneous Book 1, Page 169 in the Office of the Judge of Probate of Baldwin County, Alabama.

PARCEL THREE: The West half of the West half and West half of the East half of the Southwest quarter of Section 18, Township 5 South, Range 3 East, Baldwin County, Alabama.

PARCEL FOUR: The East half of the Southeast quarter of Section 12, Township 5 South, Range 2 East, Baldwin County, Alabama.

PARCEL FIVE: The Northwest quarter of the Northeast quarter fo [sic] the West half and the Southwest quarter of the Southeast quarter of Section 30, Township 5 South, Range 3 East, Baldwin County, Alabama.

PARCEL SIX: An undivided one-half interest in the Southwest quarter of the Southeast quarter of Section 19, Township 5 South, Range 3 East, Baldwin County, Alabama.

15. Defendant William A. Manci owns the remaining two-thirds interest in an undivided one-half interest in the hereinabove described property. The remaining named Defendants own the remaining interest in said real property.

16. The Plaintiff is presently unable to determine whether said property an be divided in kind.

17. If the property referred to hereinabove can be divided in kind, the Plaintiff prays for an equitable division of said real property.

18. If the hereinabove described real property cannot be divided in kind, the Plaintiff prays that the same be sold and all proceeds derived therefrom, after expenses of sale and this cause of action be divided one-third to the Plaintiff and two-thirds to the Defendant.

19. The Plaintiff has been required to retain the services of an attorney, to-wit: the law firm of Brackin, McGriff and Johnson, P.C., and their efforts will create a common fund for the benefit of all parties and as such they are due to be compensated for their services from the common fund so created.

WHEREFORE, Plaintiff prays that Your Honor will set this matter down for a hearing and upon a trial of this matter will determine whether said real property can be divided in kind and if so, will enter an Order partitioning said property and allocating one-third of said property to the Plaintiffs and two-thirds of said property to the Defendant, William A.

Manci, and, if the property cannot be divided in kind, will order the same sold for division and will award the Plaintiff one-third of the sale proceeds, the Defendant two-thirds of the sale proceeds after expenses of sale and will further award the law firm of Brackin, McGriff and Johnson, P.C., an attorney's fee for creating a common fund for the parties and will grant such other, further and different relief to which the parties may be entitled, the premises considered.

**COUNT FOUR**

20. The Plaintiff realleges all of the preceding allegations of the Complaint.

21. Plaintiffs have heretofore filed in the Probate Court of Baldwin County, Alabama a lien on the real property described hereinabove which lien is filed to secure the interest of the Plaintiff in the hereinabove described real property as set forth hereinabove and/or payment due from William A. Manci for legal services rendered.

WHEREFORE, Plaintiff prays that Your Honor will enforce the Plaintiff's lien on the hereinabove described real property and will Order the interest of William A. Manci in the property described hereinabove sold, with the proceeds derived therefrom to be paid to satisfy the claim of lien heretofore filed by the Plaintiff.

**COUNT FIVE**

22. The Plaintiff realleges all of the preceding allegations of the Complaint.

23. Defendant William A. Manci owes to the Plaintiff a one-third interest in the hereinabove described real property for work and labor done by the Plaintiffs for the Defendant and at the Defendant's request between the 28th day of May, 1998 and April, 2004.

WHEREFORE, Plaintiff prays that it be awarded an undivided one-third interest in the property described hereinabove, or will enter a judgment in favor of the Plaintiff against the Defendant for the value of an undivided one-third interest in the property described hereinabove as the same may be ascertained after a trial of this action, and will grant such other, further and different relief to which the Plaintiff may be entitled, the premises considered.

**COUNT SIX**

24. The Plaintiff realleges all of the preceding allegations of the Complaint.

25. On or about May 28, 1998, the Defendant and the Plaintiff entered into an Employment Agreement whereby the Plaintiff agreed to provide legal services for the Defendant at the Defendant's request.

26. Said Employment Agreement was superceded by an Agreement between the Plaintiff and

Defendant William A. Manci, dated November 10, 1998.

27. The Plaintiff rendered valuable legal services to the Defendant William A. Manci at his request.

28. The Plaintiff should be compensated for the fair value of their legal services rendered in this matter.

WHEREFORE, Plaintiff demands judgment against the Defendant William A. Manci in the sum and excess of the jurisdictional limits of this Court as fair compensation for the services rendered to Defendant William A. Manci at his request plus interest and cost.

## COUNT SEVEN

29. The Plaintiff realleges all of the preceding allegations of the Complaint.

30. Defendant has received the benefit of the Plaintiff's legal services and has failed or refused to compensate the Plaintiff for the same.

31. As a result of Defendant William A. Manci's refusal to pay for legal services to the Plaintiff, he has been thereby unjustly enriched.

WHEREFORE, Plaintiff demands judgment against the Defendant William A. Manci in the sum equal to the fair market value of the legal services rendered by the Plaintiff to the Defendant.

**COUNT EIGHT**

32. The Plaintiff realleges all of the preceding allegations of the Complaint.

33. Defendants William A. Manci, and others have entered into a conspiracy to deprive the Plaintiff of legal fees it is justly due arising from the matters set forth hereinabove.

WHEREFORE, Plaintiff demands judgment against Defendants William A. Manci and others who are presently unknown to the Plaintiff but who will be added by amendment when ascertained, for compensatory and punitive damages in an amount in excess of the jurisdictional limits of this Court and will further award punitive damages against the Defendants for their wrongful conduct in conspiring to deprive the Plaintiff of legal fees it is justly due.

/s/ Julian B. Brackin
JULIAN B. BRACKIN –
BRA033
Attorney for Plaintiff

OF COUNSEL:

BRACKIN, McGRIFF AND JOHNSON, P.C.
Post Office Box 998
Foley, Alabama 36536
251/943-4040

Please serve Defendants by certified mail:

William A. Manci
P. O. Box 103
Daphne, Al 36526

Jeanette Manci Torbert
410 Ridgewood Dr
Daphne, Al 36526

Elizabeth Manci Gardner
711 Captain O'Neal Dr
Daphne, Al 36526

Mary Sue Manci
1306 Captain O'Neal Dr
Daphne, Al 36526

Joseph A. Manci
307 Belrose Ave
Daphne, Al 36526

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**APPENDIX FF**

**IN THE SUPREME COURT OF ALABAMA**
**APPEAL NO. 1061370**

**WILLIAM A. MANCI,**

**DEFENDANT-APPELLANT**

**VS.**

**BALL, KOONS & WATSON, A PARTNERSHIP,**

**PLAINTIFF-APPELLEE**

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**APPEAL FROM THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA**
**BALDWIN COUNTY CIRCUIT COURT**
**CASE NO. CV-2004-000606**

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# APPELLANT'S REPLY BRIEF

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**Joseph J. Boswell (BOS005)**
**Attorney for Defendant-Appellant**
**P.O. Box 1112**
**Mobile, Alabama 36633-1112**
**Office Telephone: (251) 432-9458**
**Facsimile Number: (251) 432-9979**
**E-mail: jboswell@zebra.net**

## SUMMARY OF ARGUMENT 1

The Defendant-Appellant William A. Manci ("Manci") did not fail to respond and did not fail or refuse to appear and submit to being deposed by counsel for the Plaintiff-Appellee Ball, Koons & Watson, a Partnership ("BK&W") after he was served with a proper notice to which he made no objection thereto.

## ARGUMENT I

In the appellee brief of BK&W the following statement is made in the STATEMENT OF CASE:

> "On April 11, 2006, BK&W noticed the deposition of Manci. (CR 456&462). Manci failed to respond or appear for any deposition." (Emphasis supplied). (brf. p.3).

Rule 37(d) A.R.Civ.P. provides in relevant part:

> "If a party . . . fails . . . to appear before the officer who is to take the deposition, after being served with a proper notice, . . . without having made an objection thereto, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule . . . "

The Committee Comments on the 1973 Adoption of Rule 37 states in relevant part:

> "Rule 37(d) provides remedies for complete failures to respond or object to discovery for

> which compliance is expected without court order unless objected to. Previous sanctions available in instances where refusals based upon objections have been the basis of orders compelling discovery are available. That the discovery reaches objectionable matter is only available as an excuse when motion for a protective order under Rule 26(c) has been made."

On motion made by a discovering party a trial judge has authority under Rule 37(d) A.R.Civ.P. to impose the ultimate discovery sanction of dismissal or default without the necessity of the discovering party having first filed a motion to compel and without the necessity of an order compelling discovery if a party fails to appear for a deposition after being served with a proper notice without having made an objection thereto. *Moore's Federal Practice*, Vol. 7, § 37.91; Blair *v. Cooper*, 437 So. 2d 1249 (Ala. 1983); *Iverson v. Xpert Tune, Inc.*, 553 So. 2d 82 (Ala. 1989); *Cincinnati Ins. Co. Synergy Gas, Inc.*, 585 So. 2d 822 (Ala. 1991).

In the appellee brief of BK&W the following statements are made in the STATEMENT OF FACTS:

> "BK&W thereafter *noticed the deposition of Manci for April 11, 2006*. (CR 456-462). . . ." (Emphasis supplied). (brf. p.9).

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> "Although the *deposition* of Manci had been noticed *Manci refused to present himself for a deposition* and thereafter BK&W filed a

> *second notice for deposition of Manci* on May 18, 2006. (CR 592-607). *Having received no response from the deposition . . .* BK&W filed a Show Cause Motion on July 14, 2006. (CR 608-611)[1]. . . . (Emphasis supplied). (brf. p.9).
>
> "In direct and capricious defiance of the trial court's January 8, 2007 Order, *Manci once again refused. . . . to submit to depositions . . .* " (Emphasis supplied). (brf. p.11).

In the appellee brief of BK&W the following statement is made in ARGUMENT I:

> "In this case the trial court was presented with a party that demonstrated 'incessant and flagrant disrespect for Court rules and deliberate and knowing disregard for judicial authority and intentional non-responsiveness.' (CR 1123). *Manci simply refused to respond to BK&W's deposition. . . .*" (Emphasis added) (brf. p.24).

The following is included in the reporter's transcript of the hearing before the trial judge on January 2, 2007 on BK&W's motion to show cause. (R.1-R.47). Commencing on line 6 on page 3 counsel for BK&W started his argument in support of his motion to show cause. At the conclusion of his argument, commencing on line 1 of page 11 the trial judge asked: "Anything else." Counsel for BK&W responded:

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[1] BK&W's Motion To Show Cause makes no mention of Manci's alleged failure to appear for a deposition that was noticed by BK&W.

> "MR. BRACKIN: Yes. . . . "I would also say that *we've scheduled Mr. Manci's deposition twice and he's refused to show both times.* . . . (R.11)

On *April 11*, 2006 counsel for BK&W served notices of the depositions of Manci and his wife Gwen Manci to be taken in his office on *May 24*, 2006. (C.456-462)

On *May 18*, 2006, which was six days *before* the date the depositions of Manci and his wife were originally scheduled to be taken on *May 24*, 2006, counsel for BK&W served a *second notice* that the depositions of Manci and his wife would be taken in his office on *June 28*, 2006. (R.592-601).

Commencing on line 14 of page 12 counsel for Manci started his argument in opposition of the motion to show cause. Commencing on line 21 of page 25 counsel for Manci stated to the trial judge:

> "There's something before I forget about it, Your Honor. *He stood. here and represented to Your Honor that Mr. Manci's deposition has been scheduled two times and he didn't show up either time.* He scheduled the deposition of Mr. Manci *without ever contacting me* and I tried to rearrange my schedule to see if I could go ahead and be present on the date that he had scheduled the deposition, which I could not. And I contacted his office and I wrote a letter and his secretary notified me that she had tried to communicate with me about that and that she was unable to get a

response. Well, she's a nice lady and I don't dispute that she tried to do it, but I don't know why she couldn't communicate with me and leave a message if I wasn't there on my voice mail. But that is the reason Manci didn't show up for the first deposition that was scheduled, because the date it was scheduled I already had a previous commitment that I couldn't get out of. So he renoticed the deposition a second time. Two or three days before the deposition was scheduled his office called to confirm that we intended to be present at the second deposition and informed his secretary that we would be present and on time to submit to the second noticed deposition. The day before the deposition was scheduled to be held I received a notice from Mr. Brackin's office that he had something come up and he needed – he couldn't take the deposition as scheduled. Now, if you take what he said at face value, that he scheduled the deposition of Mr. Manci two times and he didn't show up, then I would be lucky to walk out of here either with a dismissal of my case maybe or sanctions imposed on me, but that simply is not the facts. The facts are exactly what I told Your Honor as to how those two depositions were not taken." (R.25-27). (Emphasis supplied).

Commencing on line 14 of page 33 counsel for BK&W then stated to the trial judge:

> "Now, Mr. Boswell is hard to reach. He doesn't have an office, he doesn't have a secretary,[2] and we try to reach him to set these depositions and we can't get him. And so when I can't get him all I can do is set it and then if he calls and says I can't do it on that day we'll work around and get another date. And I'm willing to do that. I'm willing to continue to do that, . . . " (R.33)

It was an incorrect statement made to the trial judge by counsel for BK&W that Manci "refused to show" to be deposed on May 24, 2006 as scheduled in BK&W's first notice of Manci's deposition; and it was an incorrect statement made to the trial judge by counsel for BK&W that Manci "refused to show" to be deposed on June 28, 2006 as scheduled in BK&W's second notice of Manci's deposition.

* * *

## SUMMARY OF ARGUMENT II

Pursuant to the applicable provisions of Rule 7(a), Rule 8(b), and Rule 8(d), A.R.Civ.P., the appellee and counterclaim defendant BK&W, a partnership,

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[2] Since Hurricane Katrina destroyed Boswell's office in downtown Mobile he has had and continues to have an office in his home and he does not have a full time secretary. He receives voice mail telephone messages at his listed office telephone number 24 hours a day 7 days a week which remains the same as it was prior to Hurricane Katrina.

and the individual attorney counterclaim defendants all admitted all of the averments in Manci's First Amended Counterclaim for their willful and deliberate failure and refusal to file a reply to Manci's First Amended Counterclaim that superceded Manci's original counterclaim. *Peters & Russell, Inc. v. Dorfman*, 188 F.2d 711, 712-713 (7th Cir. 1951); *Matter of Dierschke*, 975 F.2d 181, 184 (5th Cir. 1992); *Dyotherm Corporation v. Turbo Machine Company*, 39 F.R.D. 370 (D.Penn. 1966).

## ARGUMENT II

In the appellee brief of BK&W the following statement is made in the STATEMENT OF FACTS:

> "Manci answered the complaint [of BK&W] and filed a counterclaim against BK&W on July 14, 2004. (CR 34-76). BK&W filed an answer to the counterclaim on July 20, 2004. (CR 182). The individual attorneys adopted those answers. (CR 180)." (brf.p. 7).

In the appellee brief of BK&W the following statement is made in the SUMMARY OF THE ARGUMENT:

> " . . . BK&W as well as the individual lawyers making up the Firm, had fully answered the original counterclaim filed by Manci . . . " (brf. p. 21).

In the appellee brief of BK&W the following statement is made in BK&W's argument **II. THE**

**TRIAL COURT DID NOT ERR IN DISMISSING MANCI'S COUNTERCLAIM:**

> "On July 14, 2004 Manci filed a counterclaim in this matter requesting a declaratory judgment and seeking damages under the Alabama Legal Services Liability Action. (CR 38-87). BK&W as well as Ball, Koons and Watson answered in a timely and proper manner. (CR 180,182)." (brf. p. 32).

The following is affirmatively disclosed in the record in this appeal:

> On July 14, 2004, Manci timely filed his answer to BK&W's complaint and included therein a counterclaim designated as such against BK&W. (C.34-81). Manci added as additional counterclaim defendants all of the individual attorney partners in the BK&W partnership, namely: E.E. Ball (E. Ball), Harold A. Koons, III, (H. Koons), and Russell J. Watson (R. Watson). (C.38) .

On July 21, 2004, BK&W filed an answer to Manci's counterclaim as follows.

> "1. Comes now the Plaintiff and for answer to the Counterclaim would show unto your Honor that the Plaintiff admits that an attorney-client relationship existed against it and William A. Manci at all times material to this complaint and that the Plaintiff is a legal service provider as defined in section 6-5-573, Code of Alabama (1975).

> "2. Each and every other material allegation of the Counterclaim is denied and strict proof thereon is demanded." (C.182-183).

The additional counterclaim defendants were each served with the counterclaim on July 21, 2004. (C.86-88).

On April 26, 2005 Manci filed a motion for the trial judge to compel the plaintiff and counterclaim defendant BK&W to file an amended answer to Manci's counterclaim for a declaratory judgment and his counterclaim for damages in accordance with the pleading requirements of Rule 8 A.R.Civ.P., or in the alternative, a motion for the trial judge to determine the merits or validity of the Rule 11 A.R.Civ.P. certification by counsel for BK&W." (C.164-167).

On May 25, 2005, being almost 9 months after they were each served with Manci's counterclaim against them, the individual counterclaim defendants E. Ball, H. Koons and R. Watson, filed their joint and separate answer to the counterclaim as follows:

> "Comes now E.E. Ball, individually, Harold A. Koons, III, individually and Russell J. Watson, individually, said persons being all of the attorney partners of Ball, Koons & Watson and would make their answer to the complaint (sic) as follows:
>
> "Each said individual counterclaim defendant would incorporate the answer of Ball, Koons & Watson, a partnership and

would show unto this Honorable Court as follows:

"1. Each said individual admits that an attorney-client relationship existed between each said individual and William A. Manci, at all times material to the Complaint.

"2. Each said individual admits that he is a legal service provider as defined in Section 6-5-573 of the Code of Alabama, (1975).

"3. Each and every other material allegation of the counterclaim is denied as to each individual attorney and strict proof thereof is demanded" (C.180-181).

The above quoted answer that "each and every other material allegation of the counterclaim is denied as to each individual attorney and strict proof thereof is demanded" was intentionally filed after Manci had filed his motion for the trial judge to compel BK&W to file an amended answer to the counterclaim that would comply with the pleading requirements set forth in Rule 8 A.R.Civ.P.

On April 13, 2006, Manci filed an amended answer to BK&W's complaint and an amended counterclaim designated as such so as to cause the counterclaim as amended to read in its entirety as amended therein. (C.463-513). The counterclaim defendants never filed a reply to Manci's amended counterclaim.

During the oral argument of counsel for Manci in the January 2, 2007 hearing before the trial judge on

BK&W's motion to show cause, commencing on line 8 of page 29 to line 13 of page 31 of the reporter's transcript the following statements, representation and request was made to the trial judge in open court by counsel for Manci:

> "Now, I had previously filed a motion for Your Honor to compel them to file a proper answer to the counterclaim as required by Rule 8. Now when we came – that might have came before the Court, Mr. Brackin said that he wanted to wait until he took discovery to file answers to the complaint, but then he said I'll clean it up, Judge. Well, Your Honor never ruled on it; he never cleaned it up. What he did – I had about 48, maybe more than that, separately numbered paragraphs in my counterclaim against them, counterclaim for declaratory judgment and counterclaim for damages. He admitted that there was an attorney/client relationship that existed between the parties and he admitted that the counterclaim that I filed was a legal services liability action and denied everything else. Well, I had filed this on April 13th taking out those allegations that he was the owner of an undivided one fifth interest and as a matter of fact it was only about 12 days ago that Judge Reid entered an order approving the trustee's petition for final settlement in that estate action. The trustees still hold that it's not been carried out, but he has ordered in there that certain specific properties be transferred to certain specified heirs. The trustees have held the legal title

to the property from the time the trust was implemented and to this very day as we stand here they still hold the legal title to the property. And he asked the questions, Your Honor, what – well, I won't get into that. That's getting into some answers to it. But, Judge, I asked (sic) Your Honor to order him to file an answer to My First Amended Counterclaim that was filed on April 13th. And the purpose of that, Your Honor, of course, is to carry out the intent of the rules, to be an expeditious and inexpensive preparation and disposition of the case in the language that it is stated then in Rule 2 or Rule 3 of the Rules of Civil Procedure, and if he admits anything then that eliminates any discovery, the necessity of any discovery on that issue. As it is right now there is no answer.

"I filed no Motion For Sanctions. It's been about eight months now since I filed the First Amended Counterclaim and still have no response to it. That's all I have, Your Honor. Thank you."

Commencing on line 7 on page 47 of the reporter's transcript the following question was again asked of the trial judge by counsel for Manci:

"THE COURT: I'm going to take everything under advisement right now.

"MR. BOSWELL: What about him filing a proper answer to my amended counterclaim, Your Honor?

> "THE COURT: I have said I'm going to take everything else under advisement at this time and I will issue an order in this case. Thank you."

Rule 7(a) A.R.Civ.P. provides in relevant part in substance that a counterclaim denominated as such is a pleading to which a responsive pleading (reply) is required.

Rule 8(b) A.R.Civ.P. provides in relevant part in substance that a party shall in a responsive pleading admit or deny the averments upon which an adverse party relies in a pleading, but if a party is without knowledge or information sufficient to form a belief as to the truth of the averment, the party shall so state, and that has the effect of a denial.

Rule 8(d) A.R.Civ.P. provides that averments in a pleading to which a responsive pleading is required, other than those averments as to the amount of damage, are admitted when not denied a responsive pleading.

The reply of BK&W to Manci's original counterclaim that "(e)ach and every other material allegation of the Counterclaim is denied and strict proof thereon is demanded" is an improper denial of Manci's averments in his original counterclaim; and the reply of the individual attorney counterclaim defendants to Manci's original counterclaim that "[e]ach and every other material allegation of the counterclaim denied as to each individual attorney and strict proof thereof is demanded" is an improper denial of Manci's

averments in his original counterclaim; and the complete failure of each counterclaim defendant to file any reply to Manci's first amended counterclaim is an admission of all of the averments in the first amended counterclaim except those averments of the amount of damage. Rule 8(d) A.R.Civ.P. *Guilford. v. Bell*, 637 So.2d 1364 (Ala.Civ.App.1995); *Moore's Federal Practice*, Vol. 2, §8.08.

Respectfully submitted:

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**APPENDIX GG**

IN THE SUPREME COURT

OF THE

STATE OF ALABAMA

SUPREME COURT APPEALS NO. 1061370

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WILLIAM A. MANCI,

APPELLANT,

V

BALL, KOONS & WATSON,

APPELLEE.

APPEAL FROM THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA
CIRCUIT COURT NO. CV-2004-606

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APPELLEE'S BRIEF AND ARGUMENT

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ATTORNEY FOR APPELLEE

## STATEMENT OF CASE

The record in this case is voluminous and in disarray. The reasons for the discord of the record

appear to be that the Baldwin County Clerk's Office is still coming to terms with creating a record in which electronic filing and traditional hard copy filings are intertwined. Additional confusion in compiling the record may have also been a product of the unique fact that the trial court in this case was specially appointed and did not maintain an office within the County. Hence, pleadings and orders occasionally took a circuitous route in getting introduced into the Court record in contrast to a case in which the trial court and the clerk are in a centralized location. The preceding statement is not meant to disparage the Clerks ability to put the record together but merely to relay the Appellee's appreciation for the effort and to commend them for the job they were able to do given the circumstances.

The above being stated, no small measure of credit for the perplexity of the record should be attributed to the Appellant and his pentiant [sic] for filing voluminous and

* * *

On February 16, 2005, BK&W filed its first consolidated discovery requests to Manci. (CR 134-148). On the same date, BK&W filed a motion to propound more than forty (40) interrogatories. (CR 126). The Court granted the right to propound more than forty (40) interrogatories on June 13, 2005. (CR 187).

On June 17, 2005, BK&W filed a motion to compel discovery. (CR 184, 185).

On March 28, 2006 the trial court ordered that all discovery be completed within 30 days. (CR 635-636). On April 11, 2006, BK&W noticed the deposition of Manci. (CR. 456 & 462). Manci failed to respond or appear for any deposition.

On April 13, 2006, Manci amended his answer and amended the counterclaim for declaratory judgment and damages. (CR 463).

On April 21, 2006, Manci finally responded to the discovery request and in doing so objected to every question with the exception of his response to whether they had obtained an expert witness, to which he answered "no". (CR

* * *

## STATEMENT OF FACTS

On May 18, 2004, BK&W filed a lawsuit against Manci. The lawsuit was based on money owed to BK&W pursuant to a fee agreement for legal services provided for Manci by BK&W concerning his interest in the Estate of Arthur Manci. (CR 15-22).

Because BK&W is a law firm regularly practicing in all of the Circuit Courts of Baldwin County, Alabama, all Circuit Court Judges in Baldwin County recused and the Supreme Court of Alabama appointed Judge Pride Tompkins specially in this Matter. (CR100).

Manci answered the complaint and filed a counterclaim against BK&W on July 14, 2004. (CR 34-76).

BK&W filed an answer to the counterclaim on July 20, 2004. (CR 182) The individual attorneys who are BK&W adopted those answers. (CR180).

On February 16, 2005, BK&W propounded discovery requests to Manci pursuant to the applicable Alabama Rules of Civil Procedure and at the same time filed a motion to be allowed to propound more than forty (40) interrogatories. (CR 134 & 126). The trial court granted BK&W's motion to propound more than forty (40) interrogatories on June 9, 2005. (CR 187 & 188).

On May 24, 2005, BK&W made an informal request of Manci to respond to the interrogatories pending before the Court. (CR186). Receiving no response from Manci, BK&W filed a motion to compel on June 17, 2005. (CR 184 & 186).

On July 20, 2005, Manci filed a motion for Summary Judgment and at the same time filed a motion to stay all discovery pending ruling on the Summary judgment. (CR 194, 197). BK&W answered the Motion for Summary Judgment and all of the pending motions were ultimately set for hearing on March 28, 2006. (CR 8, CR 283).

After argument of the parties, the trial court entered a ruling March 28, 2006, denying Manci's Motion for Summary Judgment and ordering all discovery to be completed within thirty (30) days of the date of the order. (CR635 & 636). BK&W requested the Court to clarify the order as to the specific discovery to be answered. (CR 637). The trial

court clarified that the order was for the parties to respond to outstanding discovery contained in the court file. (CR 638). BK&W thereafter noticed the deposition of Manci for April 11, 2006. (CR 456-462). On April 13, 2006, Manci amended his answer and amended his counterclaim. (CR 463).

On April 21, 2006, Manci responded to BK&W's discovery and in the answers Manci objected to every question in the discovery with the exception of the question as to whether he had obtained the services of expert witnesses to which he replied "No". (CR 514-590).

Although the deposition of Manci had been noticed, Manci refused to present himself for a deposition and thereafter BK&W filed a second notice for deposition of Manci on May 18, 2006. (CR 592-607). Having received no response from the depositions and having received written discovery responses, which were clearly evasive and non-responsive, BK&W filed a Show Cause Motion on July 14, 2006. (CR 608-611). The trial initially granted the show cause and ordered Manci to comply. (CR. 617). Manci having failed to comply caused the trial court thereafter set the show cause matter down for a hearing on discovery issues. (CR 617).

* * *

## ARGUMENT

### I. THE TRIAL COURT DID NOT GROSSLY ABUSE IT'S DISCRETION IN ENTERING A DEFAULT JUDGMENT AGAINST MANCI AND REFUSING TO SET ASIDE THE DEFAULT JUDGMENT.

Reviewing Manci's voluminous and superfluous pleadings in this case and his brief in support of his unreasonable position reminds the undersigned of a quote attributable to English Minister Ronald Knox related to babies, "It is a loud noise at one end and a lack of responsibility at the other." *The Listener,* (BBC Publications 1925).

In this case the trial court was presented with a party that demonstrated "incessant and flagrant disrespect for Court rules and deliberate and knowing disregard for judicial authority and intentional non-responsiveness." (CR 1123). Manci simply refused to respond to BK&W's deposition and discovery requests or responded to simple discovery requests with long and evasive answers or objections that had no merit or basis in law. Manci responded to direct court orders by filing objections and unfounded appeals to higher courts instead of simply following the Court Order or making a reasonable attempt to do so or explain why he could not. Pointedly, to this very day Manci still refuses to acknowledge the trial courts orders compelling him to respond to discovery and considers them to be invalid. (Appellant's brief).

BK&W propounded discovery request for interrogatories on Manci on February 16, 2005. (CR 134). Manci failed to answer the discovery and BK&W filed a motion to compel on June 17, 2005. (CR 184-186). Manci continued to refuse to respond to the discovery requests. The trial court attempted to resolve the issue with its' order of March 28, 2006 mandating that Manci respond to the outstanding discovery. (CR 635-638).

On April 21, 2006, Manci responded to BK&W's discovery and in the alleged answers Manci objected to every question in the discovery with the exception of the question as to whether he had obtained the services of expert witnesses to which he replied "No." (CR 514-590).

It was clear to BK&W and ultimately to the trial court that Manci's answers were deliberately evasive. Under Alabama law, an evasive or incomplete answer is to be treated as a failure to answer. (*ARCP* 37(a)(3)).

During this same period of time BK&W attempted to depose Manci but was met with the same disregard and failure to respond. (CR 592-607). Ultimately BK&W had no option but to file a motion for show cause on July 14, 2006 and ask for the trial court's assistance in obtaining properly answered discovery. (CR 617).

The show cause was granted on September 12, 2006. (CR 617) However, Manci still felt no duty, responsibility or inclination to make reasonable

efforts to respond to the discovery. Ultimately the trial court had to pointedly address the discovery issues and set the show cause hearing for January of 2007 to hopefully resolve the issue.

At the hearing the trial court specifically found Manci's answers to be **non-responsive and not in good faith**. (CR 741-748. emphasis added). The trial court then Ordered Manci to answer the questions by January 19, 2007. (Id.) Manci failed to answer the questions nor did he even make an attempt at giving a reasonable reason as to why he refused to answer the questions.

BK&W filed a motion for sanctions and on February 2, 2007

* * *

**APPENDIX HH**

**IN THE SUPREME COURT OF ALABAMA**
**APPEAL NO. 1061370**

**WILLIAM A. MANCI,**

**DEFENDANT-APPELLANT**

**VS.**

**BALL, KOONS & WATSON,**
**A PARTNERSHIP,**

**PLAINTIFF-APPELLEE**

==========

**BALDWIN COUNTY CIRCUIT COURT**
**CASE NO. CV-04-606**

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**APPLICATION FOR REHEARING**

==========

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## APPLICATION FOR REHEARING

COMES NOW the Defendant-Counterclaim Plaintiff-Appellant William A. Manci (Manci) and

files this Application for Rehearing (Application) in this appeal.

## THE POINTS OF LAW AND THE FACTS THAT MANCI BELIEVES THIS HONORABLE COURT OVERLOOKED OR MISAPPREHENDED

Manci believes the specified statements in the below quoted parts of the Court's Opinion overlooked or misapprehended the true material facts that are included in the record; and Manci believes the Court did not correctly apply the law to the true material facts included in the record.

Manci also believes that the specified statements of facts in below quoted parts of the Opinion are statements of facts that are not included in the record.

### THE POINT OF LAW AND THE FACT NO. 1

> " . . . Manci argues that his failure to submit proper discovery responses was harmless because, he says, BK&W never *properly* replied to his *amended* counterclaim, and, thus, it admitted the averments of the counterclaim. Manci bases this argument on Rule 8(d), Ala. R. Civ. P., . . . *Hawk v. Bavarian Motor Works*, 342 So.2d 355 (Ala.1977) this Court dealt with the issue whether 'the failure to file a written denial of a pleading to which a response is required, under Rule 8(d), . . admits the allegations of that pleading where the issues tried are embraced in *prior*

pleadings that *were* responded to in writing' . . . In that case, the plaintiff's *original* complaint contained six counts related to an allegedly defective motorcycle. The defendant *responded* to the complaint, denying any negligence. The plaintiff later *added* a seventh count, alleging that the defendant had notice of the defect. The defendant did not file an answer to this amended complaint . . [On plaintiff's appeal this Court stated] that 'mere failure to file an *additional* answer to a recast theory of one issue already stated in a previously filed pleading could not reasonably and fairly require strict application of Rule 8(d) to thwart the just determination of this action.' . . . The Court reasoned that the *amended* complaint 'states nothing so materially different from what is stated in the *original* complaint so that an *answer* to the *original* would not sufficiently answer the amendment.' . . . We find *Hawk* to be apposite. Manci's *amended* counterclaim does not add a new basis of recovery; rather, it appears to amplify the grounds on which Manci based his request for a declaratory judgment on the contingent-fee agreement and his legal-malpractice claim. BK&W's *response* to Manci's *original* complaint was *adequate*; therefore, it did not admit the allegations of the *amended* counterclaim simply because it failed to reply to Manci's recasting of his theories." (Emphasis supplied).

## THE TRUE MATERIAL FACTS THAT ARE INCLUDED IN THE RECORD AND INCLUDED IN MANCI'S BRIEF

On July 21, 2004, BK&W timely filed its Reply to Manci's Counterclaim:

> "1. Comes now the Plaintiff and for answer to the Counterclaim would show unto your Honor that the Plaintiff admits that an attorney-client relationship existed against it and William A. Manci at all times material to this complaint and that the Plaintiff is a legal service provider as defined in section 6-5-573, Code of Alabama (1975).
>
> "2. *Each and every other material allegation* of the Counterclaim *is denied* and *strict proof thereon is demanded.*" (C.182-183). (Emphasis supplied).

Over 10 months after the additional Counterclaim Defendants were served on July 21, 2004 (C.86-88), on May 25, 2005, they filed their Reply to the Counterclaim:

> "Comes now E.E. Ball, individually, Harold A. Koons, III, individually and Russell J. Watson, individually, said persons being all of the attorney partners of Ball, Koons & Watson and would make their answer to the complaint (sic) as follows:
>
> "Each said individual counterclaim defendant would incorporate the answer of Ball, Koons & Watson, a partnership and would show unto this Honorable Court as follows:

> "1. Each said individual admits that an attorney-client relationship existed between each said individual and William A. Manci, at all times material to the Complaint.
>
> "2. Each said individual admits that he is a legal service provider as defined in Section 6-5-573 of the Code of Alabama, (1975).
>
> "3. *Each and every other material allegation of the counterclaim is denied* as to each individual attorney *and strict proof thereof is demanded*" (C.180-181). (Emphasis supplied).

On April 13, 2006, Manci filed an Amended Answer and an Amended Counterclaim so as to cause his Answer and Counterclaim to read in its *entirety* as amended. (C.463-513).

None of the Counterclaim Defendants filed a Reply to the Amended Counterclaim.

There was a hearing before the trial judge on January 2, 2007. (R.1-R.47). Commencing on line 8 of page 29 to line 16 of page 29 of the reporter's transcript the following statement was made to the trial judge by counsel for Manci:

> "Now, I had previously filed a motion for Your Honor to compel them to file a proper answer to the counterclaim as required by Rule 8. . . . Mr. Brackin said that he wanted to wait until he took discovery to file answers to the complaint, but then he said I'll clean it

> up, Judge. Well, Your Honor never ruled on it; he never cleaned it up . . . "

Thereafter, commencing on line 20 of page 30 through line 8 of page 31 counsel for Manci made the following request and statement to the trial judge:

> "Judge, I asked (sic) Your Honor to order him to file an answer to my First Amended Counterclaim that was filed on April 13th. And the purpose of that, Your Honor, of course, is to carry out the intent of the rules, to be an expeditious and inexpensive preparation and disposition of the case in the language that it is stated then in Rule 2 or Rule 3 of the Rules of Civil Procedure, and if he admits anything then that eliminates any discovery, the necessity of any discovery on that issue. As it is right now there is no answer."

The trial judge refused to order BK&W to file a Reply to Manci's Amended Counterclaim.

Contrary to this Court's statement in the Opinion that Manci says BK&W never *properly* replied to his *amended* counterclaim, Manci *did not* say that BK&W never *properly* replied to his *Amended* Counterclaim. Manci argued that BK&W did not file a *proper* Reply to his *original* Counterclaim and that BK&W filed no Reply to his *Amended* Counterclaim, and by reason thereof, pursuant to the plain language of Rule 8(d)A.R.Civ.P, BK&W *admitted* all of the averments in the original and Amended Counterclaim. (Brf.p.55).

This Court's interpretation of the Rule 8(d) A.R.Civ.P. pleading requirements as applied to the pleadings involved in the *Hawk* case was incorrectly applied to the true material facts that are included in the record.

**THE POINT OF FACT NO.2**

> " .. In April 2006, BK&W noticed the deposition of Manci, but he failed to respond to the notice or to appear for the deposition . . . "

In BK&W's Brief the following statement is made:

> "On April *11*, 2006, BK&W *noticed* the deposition of Manci. (CR 456&462). *Manci failed to respond or appear for any deposition.*" (Brf. p.3). (Emphasis supplied).

**THE FOLLOWING IS INCLUDED IN THE RECORD IN THIS APPEAL.**

Commencing on line 12 of page 11 of the reporter's transcript counsel for BK&W stated to the trial judge:

"I would also say that we've scheduled Mr. Manci's deposition twice and he's refused to show both times. . . . (R.11).

On April *11*, 2006, BK&W served notice of the deposition of Manci to be *taken* on May *24*, 2006. (C.460-461).

On May *18*, 2006, which was *six* days *before* the date the deposition of Manci was originally scheduled to be taken on May *24*, 2006, BK&W served a *second notice* that the deposition of Manci would be taken on *June 28*, 2006. (C.592-593).

Commencing on line 21 of page 25 of the reporter's transcript, counsel for Manci stated to the trial judge:

> " . . . Your Honor, [Mr. Brackin] . . . represented to Your Honor that Mr. Manci's deposition has been scheduled two times and *he didn't show up either time*. He scheduled the deposition of Mr, Manci *without ever contacting me* and I tried to rearrange my schedule to see if I could go ahead and be present on the date that he had scheduled the deposition, which I could not. And I contacted his office and I wrote a letter and his secretary notified me that she had tried to communicate with me about that and that she was unable to get a response. Well, she's a nice lady and I don't dispute that she tried to do it, but I don't know why she couldn't communicate with me and leave a message if I wasn't there on my voice mail. *But that is the reason Manci didn't show up for the first deposition that was scheduled, because the date it was scheduled I already had a previous commitment that I couldn't get out of.* So he re-noticed the deposition a *second time*. Two or three days before the deposition was scheduled his office called to confirm that we intended to be present at the second

> deposition and I informed his secretary that we would be present and on time to submit to the second noticed deposition. The day before the deposition was scheduled to be held I received a notice from Mr. Brackin's office that *he* had something come up and *he* . . couldn't take the deposition as scheduled . . . The facts are exactly what I told Your Honor as to how those two depositions were not taken." (R.25-27). (Emphasis supplied).

Thereafter, commencing on line 14 of page 33 counsel for BK&W then stated to the trial judge:

> "Now, Mr. Boswell is hard to reach. He doesn't have an office, he doesn't have a secretary, and we try to reach him to set these depositions and we can't get him. And so when I can't get him all I can do is set it and then if he calls and says I can't do it on that day we'll work around and get another date. And I'm willing to do that. I'm willing to continue to do that, . . . " (R.33).

Counsel for BK&W did not deny the representation of Manci's counsel to the trial judge in his presence that Manci's deposition to be taken pursuant to BK&W's *second* notice of deposition was cancelled by counsel for BK&W.

The statement made in the Opinion that "[i]n April 2006, BK&W noticed the deposition of Manci, but he failed to respond to the notice or to appear for the deposition" is not supported by and is contrary to

the true facts included in the record; but it is almost a verbatim quote from the Appellee Brief of BK&W.

**THE POINTS OF LAW AND FACTS NO.3**

"In *February 2005*, BK&W *submitted* its first discovery requests to Manci. Manci did not respond. In June 2005, BK&W moved the trial court to compel Manci to respond to the discovery requests. In March 2006, the trial court ordered that all pending discovery be completed within 30 days . . . Manci then. . . . responded to BK&W's first set of interrogatories with a series of *objections* and *vague* responses." (Emphasis supplied).

" . . . Manci appears to argue that the trial court erred by granting BK&W's motion for a default judgment without ever having *ordered* him to respond to the discovery requests pursuant to Rule 37(a), Ala. R. Civ. P., which provides the circumstances under which a party may move the court to compel discovery. Manci's allegation that he was not *ordered* to respond to discovery is, however, incorrect. The record indicates that BK&W *first* moved the trial court to compel discovery on June 17, 2005. The trial court entered an *order* on September 15, 2006, under which Manci was ordered 'to fully and completely *answer* the interrogatories *as propounded* on or before October 15, 2006.' The trial court entered a *second* order compelling discovery on January 8, 2007. BK&W then moved for sanctions against Manci on

> January 31, 2007. The trial court granted that motion on February 2, 2007. Manci has offered no reasonable explanation for his failure to comply with the trial court's discovery orders. . . . " (Emphasis supplied).

## THE MATERIAL TRUE FACTS THAT ARE INCLUDED IN THE RECORD AND INCLUDED IN MANCI'S BRIEF

On February *16*, 2005, BK&W filed a MOTION TO PROPOUND MORE THAN FORTY (40) INTERROGATORIES (MOTION). (C.126-148).

In the MOTION BK&W assigned the following reasons for filing the MOTION:

> "1. The .. Counterclaim for Declaratory Judgment and other Counterclaims consists of three (3) counts, fifty-six (56) paragraphs and is thirty (30) pages long."
>
> ---
>
> "3. It is *necessary* for the Plaintiffs to *initially propound* at least fifty-five (55) interrogatories. A *copy* of said [fifty-five (55)] *interrogatories* are *attached hereto* as an *Exhibit*." (C.126-148). (Emphasis supplied).

The *MOTION* has a certificate of service dated February 14, 2005 (C.127); and the *copy* of the *proposed Interrogatories* attached as an *Exhibit* to the MOTION has a certificate of service dated February 14, 2005. (C.148).

The trial judge set all pending motions for a hearing on May 23, 2005. (C.178). On May 24, 2005, counsel for BK&W wrote a letter to counsel for Manci wherein he stated:

> "We *propounded* Interrogatories . . . *on February 14, 2005*. As you know, the Judge has *now granted* our Motion to propound more than 40 Interrogatories. Please provide us *answers* to these Interrogatories within *10 days* of the date of this letter to avoid a Motion to Compel." (C.186). (Emphasis supplied).

There is nothing in the record that supports the statement of counsel for BK&W that on May 24, 2005, the trial judge had granted the MOTION.

On June 13, 2005, a *written Order* granting BK&W's MOTION was filed in the clerk's record (C.187-188); and on June 17, 2005, BK&W filed a Motion to Compel Manci to *answer* BK&W's interrogatories:

> "1. The Plaintiff *propounded* interrogatories on *February 14*, 2005. (Emphasis supplied).
>
> "2. The Court has heretofore granted a Motion to *Propound* more than 40 Interrogatories. (Emphasis supplied).
>
> "3. On May 24, 2005, the undersigned attorney wrote a letter to Defendant's attorney requesting an *answer* within *ten* days to avoid a Motion to Compel. A copy of this

letter is attached as Exhibit A and incorporated by reference.

"4. As of the date of the filing of this motion, the Interrogatories have not yet been *answered*." (C.184-186). (Emphasis supplied).

BK&W's June 17, 2005 Motion to Compel was the *FIRST* and the *ONLY* Motion to Compel filed by BK&W.

On July 20, 2005, Manci filed a Motion for Summary Judgment (C.197-198); and on the same date he filed a Motion to stay discovery pending a ruling on his motion for summary judgment. (C.194-195).

The trial judge set *all* pending motions for a hearing on March 16, 2006. (C.283). On March 28, 2006, the trial judge signed an Order as follows: (C.635-636).

"1. The Defendant William A. Manci's Motion for Summary Judgment is DENIED.

"2. That *all* discovery be completed within 30 days of the date of this order." (Emphasis supplied)

The trial judge made no ruling on BK&W's June 17, 2005, Motion to Compel.

On April 4, 2006, counsel for BK&W wrote a letter to the trial judge requesting that he *clarify* his March 28, 2006, Order. (C.637). In a letter dated April 10, 2006, the trial judge *clarified* his March 28, 2006 Order: "I meant in the order the discovery that was

outstanding contained within the court's file." (C.638).

On April 21, 2006, Manci *timely* served his *answers* and *objections* to BK&W's Rule 33 A.R.Civ.P. Interrogatories and the consolidated Rule 34 A.R.Civ.P. Request for Production of Documents (RPD). The *answers* to the interrogatories were signed and sworn to by Manci and the *objections* were made by counsel for Manci and signed by him, in conformity with the provisions and requirements of Rule 33(a) A.R.Civ.P.

Although Manci had timely responded to BK&W's interrogatories in compliance with the March 28, 2006 Order, on July 14, 2006, BK&W filed a Motion to Show Cause. (C.608-611). In that Motion BK&W assigned the following:

> "1. The Plaintiff heretofore *propounded* discovery in this matter, *on February 14, 2005*.
>
> "2. On May 24, 2005, the undersigned attorney wrote the Defendant's attorney requesting an *answer* within *ten* days to avoid a Motion to Compel. . . .
>
> "3. The *response* received in *answer* to Plaintiff's interrogatories are non-responsive and designed to obfuscate the discovery process." (All emphasis supplied).

Without giving Manci any notice of a hearing and an opportunity to be heard in opposition to BK&W's Motion to Show Cause the trial judge signed an Order

that was filed in the clerk's record on September 15, 2006, *granting* the Motion:

> "The Motion to Show Cause having come before the Court and found to be well taken, it is hereby GRANTED and Defendant is hereby ORDERED to fully and completely *answer* the interrogatories *as propounded* on or before October 16 2006 *or* it is hereby ORDERED that the Defendant appear before this Court on October 16, 2006 at the Foley courthouse at 10:00 a.m. to show cause as to why he should not be placed in the Baldwin County Jail for failure to comply with the previous discovery Orders of this Court." (C.616-617). (Emphasis supplied).

On October 11, 2006, being 5 days *before* the trial judge's October 16, 2006 discovery deadline, Manci filed a Motion for the trial judge to reconsider and vacate his September 15, 2006 discovery Order and Manci therewith filed a Motion for a Protective Order. (C.618-725).

The trial judge never ruled on Manci's motion for a protective order.

The trial judge's September 15, 2006 ex parte Order is the Order that resulted in him entering the Order of dismissal and the default judgment against Manci for his failure to comply with his September 15, 2006 ex parte discovery Order. The purpose of the January 2, 2007 hearing that was held after the October 16, 2006 hearing was continued, was for Manci to appear and show cause why he should not

be held in contempt and confined to the Baldwin County Jail for his failure to completely and fully *answer* all of BK&W's interrogatories not later than October 16, 2006. The discovery order entered on January 10, 2007 was an Order enforcing the September 15, 2006 Order.

This Court has consistently held that Rule 37 A.R.Civ.P. provides the method for dealing with a party's failure to comply with discovery. This Court incorrectly failed to apply the requirements of Rule 37(a) to determine whether there was a valid Order compelling Manci to provide BK&W the requested discovery, and; (1) **IF *NOT***, the Court incorrectly failed to determine whether the trial judge had *authority* to impose the ultimate draconian discovery sanctions of default and dismissal against Manci under Rule 37(b), and; (2) **IF *YES***, the Court incorrectly applied the Kirtland factors in the Opinion to determine whether the trial judge exceeded his discretion in refusing to set aside the most severe Rule 37(b) discovery sanction he could impose by entering a default judgment and dismissal of Manci's Counterclaim.

## THE POINTS OF LAW NO.4

Article I, Section 10 of the Alabama Constitution holds inviolate Manci's right to have his day in court to prosecute his counterclaim on its merits and to defend on the merits the claims made against him in BK&W's complaint. Manci believes this Court's

Opinion deprived him of his Article I, Section 10 right to have his day in court.

Article I, Section 13 of the Alabama Constitution guarantees to Manci that he cannot be deprived of his property without due process of law. The Fourteenth Amendment of the United States Constitution guarantees to Manci that he cannot be deprived of his property without due process of law.

The State and federal constitutional right to due process of law include the right to a fair trial and fair appellate review of the facts in the record and the right to have the correct law applied to the true facts. Manci believes this Court did not fairly review the facts in the record; and that this Court did not apply the correct law to the true facts included in the record.

Manci's Article I, Section 10 constitutional right to have his day in court is a protectable property interest that he cannot be deprived of without due process of law. "The provisions of Rule 37 . . . must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law." *Societe Internationale v. Rogers*, 357 U.S. 197 at 209, (1958). At the time the trial judge issued the discovery Order granting BK&W's Motion to Show Cause without prior notice to Manci and a meaningful opportunity to be heard, there was no existing discovery Order that Manci had violated. That Order was made by the trial without authority under any discovery rule of the Alabama

rules of civil procedure, and it was the predicate Order upon which the trial judge imposed the discovery sanctions of default judgment and dismissal of the counterclaim.

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**APPENDIX II**

**IN THE SUPREME COURT OF ALABAMA**

**APPEAL NO. 1061370**

**WILLIAM A. MANCI,**

**DEFENDANT-APPELLANT**

**VS.**

**BALL, KOONS & WATSON, A PARTNERSHIP,**

**PLAINTIFF-APPELLEE**

---

**BALDWIN COUNTY CIRCUIT COURT CASE NO. CV-04-606**

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# BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

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## STATEMENT REGARDING ORAL ARGUMENT

APPLICANT-APPELLANT DOES NOT REQUEST ORAL ARGUMENT

## STATEMENT OF JURISDICTION

THE OPINION OF THIS COURT WAS RELEASED ON MAY 23, 2008. THIS APPLICATION FOR REHEARING IS FIELD OUT-OF-TIME UNDER THE DEEMED FILED RULE ON JUNE 9, 2008, THE 17TH DAY AFTER THE RELEASE OF THE OPINION, ACCOMPANIED WITH A MOTION THAT THE COURT ACCEPT THE OUT-OF-TIME FILING OF THIS APPLICATION FOR REHEARING AND THE BRIEF IN SUPPORT OF THE APPLICATION.

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## STATEMENT OF THE CASE

The statement of the case included in the original Brief of Appellant William A. Manci (Manci) is incorporated herein.

On May 23, 2008, this Court released its Opinion affirming the matters from which Manci appealed.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

**1.** Is the statement of fact made by this Court that is quoted under THE POINTS OF LAW AND FACTS NO.1 that Manci said BK&W never *properly* replied to his *amended* counterclaim contrary to the true relevant facts included in the record and incorrect?

**1A.** If the answer to Issue Number 1 above is ***YES***, then based on the true relevant facts included in the record, did this Court incorrectly apply the rule

pronounced in *Hawk v. Bavarian. Motor Works,* 342 So.2d 355 (Ala.1977) to Manci's Counterclaim and Amended Counterclaim and the adequacy of BK&W's reply to the Counterclaim and failure to reply to the Amended Counterclaim?

**2.** Is the statement of fact made by this Court that is quoted under THE POINT OF FACT NO.2 that in April 2006, BK&W noticed the deposition of Manci but he failed to respond to the notice or to appear for the deposition contrary to the true relevant facts included in the record and incorrect?

**2A.** If the answer to issue number 2 above is ***NO***, then based on the absence of anything in the record to support that factual statement by this Court, did this Court incorrectly make that factual finding based solely on the statement made by BK&W on page 3 of its Appellee Brief?

**3.** Are the statements of facts made by this Court that are quoted under THE POINTS OF LAW AND FACTS NO.3 contrary to the true relevant facts included in the record and incorrect?

**3A.** If he [sic] answer to issue number **3** above is ***YES***, then based on the true relevant facts included in the record, did the trial judge have authority to enter the discovery sanctions of default and dismissal under Rule 37(b)((2) A.R.Civ.P.?

**3B.** If he [sic] answer to issue number **3** above is ***NO***, then based on the relevant true facts included in the record, did the trial judge incorrectly apply the

Kirtland factors in his Order denying Manci's Rule 55(c) motion for the him to set aside his discovery sanction default judgment and dismissal of Manci's Counterclaim?

**4.** Did this Court make multiple incorrect statements of facts in the Opinion and fail to apply the correct law to the true facts included in the record to the extent that the totality of those substantial errors deprived Manci of constitutional rights in the following:

**4A.** Does the Opinion deprive Manci of his constitutional right under Article I, Section 10 of the Alabama Constitution to have his day in court to defend on the merits the claims made against him in BK&W's Complaint and to prosecute his Counterclaim on the merits?

**4B.** Does the Opinion violate and deprive Manci of his constitutional right not to be deprived of his property without due process of law that is guaranteed to him by Article I, Section 13 of the Alabama Constitution and by the Fourteenth Amendment of the United States Constitution?

## STATEMENT OF THE STANDARD OF REVIEW

The standard of review of all issues presented is de novo.

## SUMMARY OF ARGUMENT I

The facts found by this Court and quoted under the POINTS OF LAW AND FACTS NO.1 are contrary to the true relevant facts included in the record and are incorrect.

## ARGUMENT I

The true relevant facts included in the record are set out in Manci's Application For Rehearing (Application) and restated in part as follows:

On July 21, 2004, BK&W timely filed its Reply to Manci's Counterclaim:

> "1. Comes now the Plaintiff and for answer to the Counterclaim would show unto your Honor that the Plaintiff admits that an attorney-client relationship existed against it and William A. Manci at all times material to this complaint and that the Plaintiff is a legal service provider as defined in section 6-5-573, Code of Alabama (1975).
>
> "2. *Each and every other material allegation* of the Counterclaim *is denied* and *strict proof thereon is demanded.*" (C.182-183). (Emphasis supplied).

On May 25, 2005, the other Counterclaim Defendants filed their Reply to the Counterclaim:

> "Comes now E.E. Ball, individually, Harold A. Koons, III, individually and Russell J. Watson, individually, said persons being all

> of the attorney partners of Ball, Koons & Watson and would make their answer to the complaint (sic) as follows:
>
> "Each said individual counterclaim defendant would incorporate the answer of Ball, Koons & Watson, a partnership and would show unto this Honorable Court as follows:
>
> "1. Each said individual admits that an attorney-client relationship existed between each said individual and William A. Manci, at all times material to the Complaint.
>
> "2. Each said individual admits that he is a legal service provider as defined in Section 6-5-573 of the Code of Alabama, (1975).
>
> "3. *Each and every other material allegation of the counterclaim is denied* as to each individual attorney *and strict proof thereof is demanded*" (C.180-181). (Emphasis supplied).

On April 13, 2006, Manci filed an Amended. Answer and an Amended Counterclaim so as to cause his Answer and Counterclaim to read in its *entirety* as amended. (C.463-513).

None of the Counterclaim Defendants filed a Reply to the Amended Counterclaim.

Contrary to factual statement in the Opinion that Manci says BK&W never *properly* replied to his *amended* counterclaim, Manci argued to this Court in his Appellant Brief that BK&W did not file a *proper* Reply to his *original* Counterclaim (Brf.p.55) and that

BK&W filed *no* Reply to his *Amended* Counterclaim. (Brf.p.55).

The correct law as applied to the true facts in the record on the effect of a party's failure to deny an averment by a written answer or reply is set out and argued in Argument II of Manci's Appellant Brief. Argument II and all of the cases and authorities cited are incorporates [sic] herein by reference.

## SUMMARY OF ARGUMENT II

This Court's finding that in April 2006 BK&W noticed the deposition of Manci, but he failed to respond to the notice or appear for the deposition is contrary to the true facts included in the record and is incorrect.

## ARGUMENT II

In that part of the Opinion that is quoted under THE POINT OF FACT NO.2 this Court stated as a fact:

> " . . In April 2006, BK&W noticed the deposition of Manci, but he *failed to respond* to the notice *or to appear for the deposition* . . . " (Emphasis supplied).

In the Appellee Brief of BK&W the following statement is made:

> "On April 11, 2006, BK&W noticed the deposition of Manci. (CR 456&462). Manci *failed*

*to respond or appear for any deposition.*" (Brf. p.3). (Emphasis supplied).

**THE FOLLOWING IS INCLUDED IN THE RECORD IN THIS APPEAL.**

Commencing on line 12 of page 11 of the reporter's transcript (R.1-R.47) counsel for BK&W stated to the trial judge:

> "I would also say that we've scheduled Mr. Manci's deposition twice *and he's refused to show both times*. . . . (R.11). (Emphasis supplied).

On *April 11*, 2006, BK&W served notice of the deposition of Manci to be taken *on May 24*, 2006. (C.460-461).

On *May 18*, 2006, which was *six* days *before* the date the deposition of Manci was originally scheduled to be taken on *May 24*, 2006, BK&W served a *second notice* that the deposition of Manci would be taken on *June 28*, 2006. (R.592-593).

Commencing on line 21 of page 25 of the transcript counsel for Manci stated to the trial judge:

> " . . Your Honor [Mr. Brackin] represented to Your Honor that Mr. Manci's deposition has been scheduled two times and he didn't show up either time. He scheduled the deposition of Mr, Manci without ever contacting me and I tried to rearrange my schedule to see if I could go ahead and be present on the date that he had scheduled the deposition, which

> I could not. And I contacted his office and I wrote a letter and his secretary notified me that she had tried to communicate with me about that and that she was unable to get a response. Well, .. I don't know why she couldn't communicate with me and leave a message if I wasn't there on my voice mail. *But that is the reason Manci didn't show up for the first deposition that was scheduled* . . . So he re-noticed the deposition a *second time*. Two or three days before the deposition was scheduled his office called to confirm that we intended to be present at the second deposition and I informed his secretary that we would be present and on time to submit to the second noticed deposition. The day before the deposition was scheduled to be held I received a notice from Mr. Brackin's office that *he* had something come up and *he* .. couldn't take the deposition as scheduled . . . The facts are exactly what I told Your Honor as to how those two depositions were not taken." (R.25-27). (Emphasis supplied).

Commencing on line 14 of page 33 counsel for BK&W then stated to the trial judge:

> "Now, Mr. Boswell is hard to reach. He doesn't have an office, he doesn't have a secretary, and we try to reach him to set these depositions and we can't get him. And so when I can't get him all I can do is set it and then if he calls and says I can't do it on that day we'll work around and get another date. And I'm willing to do that. I'm willing to continue to do that, . . . " (R.33).

Counsel for BK&W did not deny the representation of Manci's counsel to the trial judge in his presence that Manci's *second* noticed deposition was cancelled by counsel for BK&W.

The *fact* stated in the Opinion that is quoted under THE POINT OF FACT 2 is not included in the record and it is *incorrect*; but it is almost a *verbatim quote from BK&W's Appellee Brief.* (Brf. p.3).

## SUMMARY OF ARGUMENT III

Based on the true relevant facts included in the record the trial judge was without authority to impose the discovery sanctions of default and dismissal under Rule 37(b) A.R.Civ.P.

## ARGUMENT III

The facts found by this Court and quoted under the POINTS OF LAW AND FACTS NO.3 are contrary to the true relevant facts included in the record and are incorrect.

In *Societe Internationale v. Rogers,* 357 U.S. 197; 78 S. Ct. 1087; 2 L. Ed. 2d 1255 (1958) the United States Supreme Court stated in relevant part:

> "In our opinion, whether a court has power to dismiss a complaint because of noncompliance with a production order depends *exclusively* upon *Rule 37,* which addresses itself *with particularity* to the consequences of a failure to make discovery by listing a variety

> of remedies which a court may employ. There is no need to resort to Rule 41(b). . . . " (Emphasis supplied).
>
> 357 U.S. at 206-207; 78 S.Ct. at 1092-1093; 2 L.Ed.2d at 1263-1264

In *Societe* the Supreme Court then stated:

> "The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law,. . . . "
>
> 357 U.S. at 209; 78 S. Ct. at 1095; 2 L.Ed.2d at 1265

"Because the Alabama and federal rules are virtually identical, a presumption arises that cases construing the federal rules are authority for construction of the Alabama rules." *Ex parte Maple Chase Company,* 840 So. 2d 147 (Ala. 2002); *Iverson v. Xpert Tune, Inc.,* 553 So.2d 82, 87(Ala. 1989).

A federal court may not impose discovery sanction under Rule 37(b) unless a prior valid discovery was issued and directed to the party from whom discovery is sought and violated by that party, and the trial court *must identify* the *order* that was *violated. Atkins v. Fischer,* 232 F.R.D.116 (D.C.Columbia, 2005). An order compelling discovery can be oral or written, but it cannot be *implied. Salahuddin v. Harris,* 782 F. 2d 1127, 1131-32 (2nd Cir.1986).

Rule 37 A.R.Civ.P. provides the method for dealing with a party's failure to comply with discovery. *Iverson v. Xpert Tune, Inc.*, 553 So.2d 82, 87 (Ala.1989). "When the discovery procedure is initially set in motion by the parties themselves without court order, the party seeking discovery must first obtain an order under Rule 37(a) requiring the recalcitrant party . . . to make the discovery sought; it is only a violation of this order that is punishable under Rule 37(b)." *Dutton v. Dutton,* 446 So.2d 615, 618 (Ala. Civ. App.1983).

The record in this appeal discloses the following sequence of discovery events:

On February *16*, 2005, BK&W filed a MOTION TO PROPOUND MORE THAN FORTY (40) INTERROGATORIES (MOTION) and BK&W attached a *copy* of the *proposed interrogatories* as an EXHIBIT to the MOTION. (C.126-148). The MOTION and the EXHIBIT each have a certificate of service date of February 14, 2005 (C.127 & C.148), which was two days *before* the MOTION was *filed.* If it was the intent of BK&W that the 55 interrogatories were *propounded* to Manci by BK&W *serving* the interrogatories upon Manci on February 14, 2005, without first having obtained leave of Court to do so, then Manci would have been obligated to serve his answers and objections not later than 33 day [sic] after February 14, 2005, and he would have been obligated to answer or object only to the first 40 interrogatories. *Rule 33(a) A.R.Civ.P.*

BK&W wrote a letter to counsel for Manci on May 24, 2005, stating than the trial judge had granted its MOTION and demanding Manci's *answers* to the interrogatories within *10* days "to avoid a motion to compel," (C.186). There is nothing in the record that supports the statement that on May 24, 2006, the trial judge had granted BK&W's MOTION.

On June 13, 2004 a *written* Order was filed in the clerk's record granting BK&W's MOTION. (C.187-188). Four days later, on June 17, 2005, BK&W filed its *FIRST* and *ONLY* motion to compel, averring therein that the interrogatories were *propounded* to Manci on February 14, 2005. (C.184-185). Interrogatories are *propounded* when they are *served,* and when they are *served* they are *submitted. Rule 33 A.R.Civ.P.* BK&W never *served* the interrogatories upon Manci. The interrogatories were not *propounded* to Manci on February 14, 2005.

On March 28, 2006, the trial judge signed an Order that *all* discovery be completed within 30 days. That Order was *not directed* to *Manci.* On its *face* it was *directed* to *all* parties. Counsel for BK&W read the *words* but was *uncertain* whether the Order was *applicable to BK&W,* so on April 4, 2006, he wrote a letter to the trial judge requesting clarification of the Order; and in a letter dated April 10, 2006, the trial judge *clarified* the Order by stating that he *meant* the discovery that was outstanding contained in the clerk's file. (C.637-638). That clarification did not transform the *March 28, 2006* Order into an Order *granting* BK&W's Motion to Compel.

On April 21, 2006 Manci timely served and filed his *answers* and *objections* to each separate discovery request in BK&W' consolidated discovery document. (C.514-590).

BK&W was not satisfied with the discovery responses so on July 14, 2006, almost 3 months after receiving the answers and objection, BK&W filed a *Motion to Show Cause* on the ground Manci's *answers* were "nonresponsive and designed to obfuscate the discovery process." (C.609-610).

In *Ex parte The Terminix International Company L.P.,* 897 So.2d 280 (Ala.2004) this Court stated in relevant part:

> "While Rule 37(a)(2), Ala. R. Civ. P., refers to the discovering party's motion to compel in permissive terms ('the discovering party may move for an order compelling an answer'), the discretion thus conferred relates only to the *decision that a discovering party must make* as to whether to pursue further discovery *by motion after the objection has been interposed.,,* (Citations omitted). (Emphasis supplied).
>
> "As is true with objections to interrogatories . . . , *the* discovery procedure *stops* upon the *interposition of the objection unless a motion under Rule 37 is filed by the party seeking discovery. Absent* such a motion, *the objection is not brought to the attention of the court for a ruling.*" (Emphasis supplied).
>
> 897 So.2d at 283

The trial judge granted BK&W's Motion to Show Cause in his ex parte September 15, 2006 discovery Order. At the time he entered that ex parte discovery Order there was no prior discovery made that Manci had violated; and he had never ruled on any objection made by Manci in his response to BK&W's consolidated discovery requests.

On October 11, 2006, being 5 days *before* the October 16, discovery deadline, Manci timely filed a motion for the judge to reconsider and vacate his September 15, 2006 Order, and Manci filed therewith a motion for a protective order. (C.618-725).

During the hearing before the trial judge on January 2, 2007 counsel for Manci argued to the trial judge the procedural requirements of Rules 33 and 37. (R.17-25).

The trial judge ignored Manci's timely filed motion for a protective order; he ignored the discovery rules adopted and interpreted by this Court; and he refused to apply the rules to himself. BK&W *never complied* with *any* of the procedural discovery rules, and the trial judge refused to Order BK&W to comply with the discovery rules. The trial judge was biased in favor of BK&W or its clients, or both.

The trial judge was without authority to impose the discovery sanctions of dismissal and default under Rule 37(b).

The trial judge incorrectly applied the Kirtland factors to the discovery sanction default judgment and dismissal.

## SUMMARY OF ARGUMENT IV

This Court's Opinion violated and deprived Manci of constitutional rights and protections guaranteed to him by the Alabama Constitution and violated the Fourteenth Amendment's guarantee that no State shall deprive any person of property without due process of law.

## ARGUMENT IV

Article I, § 10 of the Alabama Constitution holds inviolate Manci's right to have his day in court to prosecute his counterclaim on the merits and to defend on the merits the claims made against him BK&W's complaint. Manci has a constitutional right under Article I, § 13 of the Alabama Constitution not to be deprived of his property without due process of law. The Fourteenth Amendment of the Federal constitution prohibits any State of depriving any person of life, liberty or property without due process of law. This Courts Opinion denied and deprived Manci of his State and Federal constitutional right to a fair appellate review in this appeal.

## CONCLUSION

This Court should grant Manci's Application For Rehearing

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## CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 9th day of June, 2008, I served a copy of the foregoing Brief in Support of Application For Rehearing on the below named attorney of record for Plaintiff-Counterclaim Defendant-Appellee in this appeal by depositing a copy of the same in the United States mail to the stated address, properly addressed and first class postage prepaid:

Julian B. Brackin, Esq.
BRACKIN, McGRIFF and
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Post Office Box 998
Foley, Alabama 36536

/s/ Joseph J. Boswell
Joseph J. Boswell (BOS005)

**APPENDIX JJ**

**IN THE SUPREME COURT OF ALABAMA**
**APPEAL NO. 1061370**

**WILLIAM A. MANCI,**
**DEFENDANT-APPELLANT-APPLICANT**

**VS.**

**BALL, KOONS & WATSON, A PARTNERSHIP,**
**PLAINTIFF-APPELLEE**

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**BALDWIN COUNTY CIRCUIT COURT CASE**
**NO. CV-04-606**

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**RULE 27 ARAP COMBINED MOTIONS**

**MOTION OF DEFENDANT-APPELLANT-APPLICANT FOR COURT TO ACCEPT OUT-OF-TIME FILING OF APPLICATION FOR REHEARING AND BRIEF**

**AND**

**MOTION FOR COURT TO ORDER STAY OF ISSUANCE OF CERTIFICATE OF JUDGMENT UNTIL COURT RULES ON MOTION TO ACCEPT OUT-OF-TIME FILING**

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**RULE 27 ARAP COMBINED MOTIONS**

COMES NOW the Defendant-Appellant-Applicant William A. Manci (Manci), pursuant to Rule 27 ARAP, and files this motion for this Honorable Court to accept the out-of-time filing of his application for rehearing (Application) and brief in support thereof (Brief), and this combined motion for this Court to Order that issuance of the certificate of judgment be stayed until this Court has ruled on the motion for the Court to accept the out-of-time filing of the Application and Brief. As grounds and reasons for the filing of these combined motions, Manci assigns and represents the following.

**1.** The Opinion in this appeal affirming the matters from which Manci appealed was released on Friday, May 23, 2008.

**2.** Rule 40(a)(1) ARAP provides that a party who has not prevailed may apply for a rehearing by filing an Application and a Brief at the time the Application is filed.

**3.** Rule 40(c) ARAP provides that an Application and Brief must be filed with the Clerk of this Court within 14 days of the date of the decision being questioned is issued.

**4.** Manci's Application and Brief were due to be timely filed with the Clerk of this Court not later than Friday, June 6, 2008.

**5.** Rule 41(a) ARAP provides that the certificate of judgment of this Court (Certificate) shall issue 18 days after the entry of judgment unless the time is shortened or enlarged by Order.

**6.** Rule 41(a)(2) ARAP provides that the timely filing of an Application and Brief will stay the issuance of the Certificate.

**7.** Counsel for Manci was unable to timely file Manci's Application and Brief for the reasons stated hereinbelow.

**8.** This Court retains jurisdiction over this appeal until it issues the Certificate. *Fireman's Fund American Ins. Co. v. Coleman,* 394 So.2d 334 (Ala. 1980).

**9.** This Motion for this Court to accept Manci's out-of-time filing of his Application and Brief, and this combined Motion for this Court to Order a stay of the issuance of the Certificate, are filed in this Court under the deemed filed rule on Monday, June 9, 2008, which is the 17th day after the release of the Opinion on Friday, May 23, 2008.

**10.** If this Court issues the Certificate before ruling on the Motion to stay the issuance of the Certificate, this Court will no longer have jurisdiction over this appeal and cannot later rule on either of these combined Motions unless the Court recalls the Certificate or uses some other available procedural device or has inherent power to do so.

**11.** The grounds and reasons for filing these combined Motions are:

**A.** This Court released the Opinion on Friday, May 23, 2008.

**B.** Monday May 26, 2008 was a legal Holiday and there was no delivery of U.S. mail on that date.

**C.** Counsel for Manci was unable obtain a copy of the Opinion prior to Tuesday afternoon, May 27, 2008, which was the 4th day after release of the Opinion.

**D.** When counsel for Manci first read the Opinion of this Court he was of the opinion that this Court had made incorrect factual statements therein which were the facts upon this Court applied the law to affirm the matters from which Manci appealed.

**E.** Rule 40(g) ARAP provides:

> "The application for rehearing must state with particularity the points of law or the facts the applicant believes the court overlooked or misapprended. The brief in support of the application must contain any

arguments in support of the application the petitioner desires to present."

**F.** Counsel for Manci is hesitant to file anything in this Court asserting that this Court overlooked or misunderstood material facts included in the record; and he is more hesitant to suggest, much less say, that this Court misapprended the law.

**G.** Counsel for Manci was confident when he filed Manci's Appellant Brief that he had accurately stated the facts included in the record; but if the statements of facts made by this Court in the Opinion are correct, then counsel for Manci had missed things in the record and had unintentionally made incorrect statements of facts to this Court in his Appellant Brief.

**H..** When counsel for Manci first had access to the Opinion on May 27, 2008, there were 10 days remaining in which to timely file Manci's Application and Brief.

**I.** In order to comply with the mandates in Rule 40(b), i.e. to state with particularity the points of law or the facts he believes this Court overlooked or misapprehended, it was necessary for him to carefully review the entire record in this appeal. He did that.

**J.** There are three separate points of law and facts included in the Application wherein counsel for Manci states with particularity the incorrect statements of facts made by this Court in the Opinion, and

he directs this Court's attention to the specific place in the record where the correct facts are included.

The following is THE POINT OF LAW AND THE FACT NO.1 in the Application:

"Manci believes the specified statements in the below quoted parts of the Court's Opinion overlooked or misapprehended the true material facts that are included in the record; and Manci believes the Court did not correctly apply the law to the true material facts included in the record.

"Manci also believes that the specified statements of facts in below quoted parts of the Opinion are statements of facts that are not included in the record.

**THE POINT OF LAW AND THE FACT NO.1**

" . . . Manci argues that his failure to submit proper discovery responses was harmless because, he says, BK&W never *properly* replied to his *amended* counterclaim, and, thus, it admitted the averments of the counterclaim. Manci bases this argument on Rule 8(d), Ala. R. Civ. P., . . . In *Hawk v. Bavarian Motor Works,* 342 So.2d 355 (Ala.1977) this Court dealt with the issue whether the failure to file a written denial of a pleading to which a response is required, under Rule 8(d), . . admits the allegations of that pleading where the issues tried are embraced in *prior* pleadings that *were* responded to in *writing*' . . . In that case, the plaintiff's *original* complaint

contained six counts related to an allegedly defective motorcycle. The defendant *responded* to the complaint, *denying* any negligence. The plaintiff later *added* a seventh count, alleging that the defendant had notice of the defect. The defendant did not file an answer to this amended complaint . . [On plaintiff's appeal this Court stated] that 'mere failure to file an *additional* answer to a recast theory of one issue already stated in a previously filed pleading could not reasonably and fairly require strict application of Rule 8(d) to thwart the just determination of this action.' . . . The Court reasoned that the *amended* complaint 'states nothing so materially different from what is stated in the *original* complaint so that an *answer* to the *original* would not sufficiently answer the amendment.' . . . We find *Hawk* to be apposite. Nanci's *amended* counterclaim does not add a new basis of recovery; rather, it appears to amplify the grounds on which Manci based his request for a declaratory judgment on the contingent-fee agreement and his legal-malpractice claim. BK&W's *response* to Manci's *original* complaint was *adequate*; therefore, it did not admit the allegations of the *amended* counterclaim simply because it failed to reply to Manci's recasting of his theories." (Emphasis supplied).

**"THE TRUE MATERIAL FACTS THAT ARE INCLUDED IN THE RECORD AND INCLUDED IN MANCI'S BRIEF**

"On July 21, 2004, BK&W timely filed its Reply to Manci's Counterclaim:

"1. Comes now the Plaintiff and for answer to the Counterclaim would show unto your Honor that the Plaintiff admits that an attorney-client relationship existed against it and William A. Manci at all times material to this complaint and that the Plaintiff is a legal service provider as defined in section 6-5-573, Code of Alabama (1975).

"2. Each and every other material allegation of the Counterclaim *is denied* and *strict proof thereon is demanded.*" (C.182-183). (Emphasis supplied).

"Over 10 months after the additional Counterclaim Defendants were served on July 21, 2004 (C.86-88), on May 25, 2005, they filed their Reply to the Counterclaim:

"Comes now E.E. Ball, individually, Harold A. Koons, III, individually and Russell J. Watson, individually, said persons being all of the attorney partners of Ball, Koons & Watson and would make their answer to the complaint (sic) as follows:

Each said individual counterclaim defendant would incorporate the answer of Ball, Koons & Watson, a partnership and would show unto this Honorable Court as follows:

"1. Each said individual admits that an attorney-client relationship existed between each said individual and William A. Manci, at all times material to the Complaint.

"2. Each said individual admits that he is a legal service provider as defined in Section 6-5-573 of the Code of Alabama, (1975).

"3. *Each and every other material allegation of the counterclaim is denied* as to each individual attorney *and strict proof thereof is demanded*" (C.180-181). (Emphasis supplied).

"On April 13, 2006, Manci filed an Amended Answer and an Amended Counterclaim so as to cause his Answer and Counterclaim to read in its *entirety* as amended. (C.463-513).

"None of the Counterclaim Defendants filed a Reply to the Amended Counterclaim." (Application,pp.1-3).

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"Contrary to this Court's statement in the Opinion that Manci says BK&W never *properly* replied to his *amended* counterclaim, Manci *did not* say that BK&W never *properly* replied to his *Amended* Counterclaim. Manci argued that BK&W did not file a *proper* Reply to his *original* Counterclaim and that BK&W filed *no* Reply to his *Amended* Counterclaim, and by reason thereof, pursuant to the plain language of Rule 8(d) A.R.Civ.P, BK&W *admitted* all of the averments in the original and Amended Counterclaim. (Brf.p.55).

"This Court's interpretation of the Rule 8(d) A.R.Civ.P. pleading requirements as applied to the pleadings involved in the *Hawk* case

was incorrectly applied to the true material facts that are included in the record." (Application, pp.4-5).

**K.** On THE POINT OF LAW AND THE FACT NO.1, THE POINT OF FACT NO.2, and THE POINTS OF LAW AND FACTS NO.3 in the Application, counsel for Manci states with particularity the incorrect statements of facts made by this Court in the Opinion, and he directs this Court's attention to the specific place in the record where the correct facts are included.

**L.** In THE POINT OF LAW NO. 4 in the Application it is stated that the Opinion make multiple incorrect statements of facts and applies the wrong law to the true facts included in the record and the totality of those substantial errors to the prejudice and damage of Manci has:

**(1)** Deprived Manci of his constitutional right under Article I, Section 10 of the Alabama Constitution to have his day in court and defend on the merits the claims made against him by BK&W in the Complaint, and to prosecute his counterclaim against BK&W and the other Counterclaim Defendants on the merits;

**(2)** Deprived Manci of his constitutional right not to be deprived of his property without due process of law that is guaranteed to him by Article I, Section 13 of the Alabama Constitution and the Fourteenth Amendment of the United States Constitution, each of which include the right to a fair trial and a fair

review of the record by this Court and the duty of this Court to exercise the power and authority the Court has to remedy wrongs inflicted on a party by a lower tribunal.

**12.** Counsel for Manci did not have an associate attorney or paralegal who could assist him in carefully reviewing the entire record in this appeal; and if he had such assistance available he would have been reluctant to assign what they told him as a statement in the Application that this Court made incorrect factual statements in the Opinion and failed to apply the correct law to the true facts included in the record.

**13.** Counsel for Manci worked diligently in an effort to complete a careful review of the entire record in this appeal and to do additional legal research that was made necessary by the incorrect statements of facts in the Opinion, but he was unable to complete preparation of the Application and Brief and get them to a copier in sufficient time to have the them copied and bound and get them to a U.S. Post Office on Friday June 6, 2008 and timely them [sic] file on that date under the deemed filed rule.

WHEREFORE, Manci prays that this Honorable Court will grant him the following relief:

**1.** That the Court will grant his motion for this Court to Order a stay of the issuance of the certificate of judgment until this Court rules on this Motion.

**2.** That this Court will grant Manci's Motion to file the Application For Rehearing and the Brief in support thereof out-of-time, both of which are enclosed with these combined motions.

Respectfully submitted:

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/s/ Joseph J. Boswell
Joseph J. Boswell (BOS005)
Attorney for William A. Manci

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I, the undersigned, do hereby certify that on this 9TH day of June, 2008, I served a copy of the foregoing **Rule 27 ARAP combined Motions** on the below named attorneys of record for Plaintiff-Counterclaim Defendant-Appellee in this appeal by depositing a copy of the same in the United States mail to the stated address, properly addressed and first class postage prepaid:

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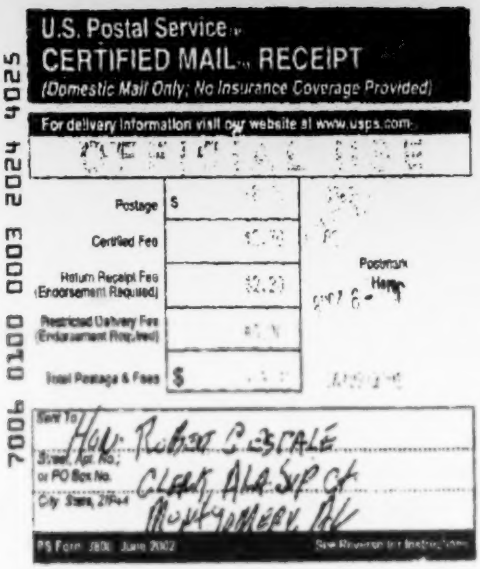
/s/ Joseph J. Boswell
Joseph J. Boswell (BOS005)

**APPENDIX KK**



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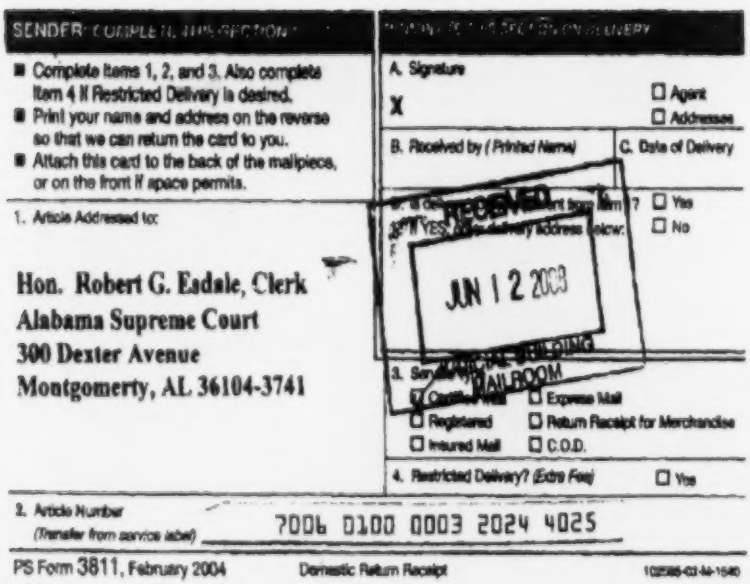

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